

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

PASO ROBLES JOINT UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2011020014

DECISION

Administrative Law Judge (ALJ) Adeniyi Ayoade, Office of Administrative Hearings (OAH), State of California, heard this matter in Paso Robles, California on April 5-8, and June 3-6, 2011.

Andréa Marcus, Attorney at Law, and Brad Bailey, Education Advocate, appeared and represented Parents on behalf of Student (Student). Student's mother (Mother) attended all hearing days, and father (Father) was present during parts of the proceedings. Student was not present.

Marsha Bedwell and Shauna Cunningham, Attorneys at Law, represented the Paso Robles Joint Unified School District (District). Marcia Murphy, District's Director of Special Education, attended all hearing days.

Student filed this request for a due process hearing (complaint) on February 1, 2011. On March 3, 2011, the parties requested and received a continuance of the hearing dates. Oral and documentary evidence were received at the hearing. At the close of the hearing, the parties requested and were granted a continuance to file

written closing briefs. District and Student timely filed their closing briefs on June 20, 2011, at which time the ALJ closed the record and the matter was submitted.<sup>1</sup>

## ISSUES<sup>2</sup>

Whether District failed to provide Student with a free appropriate public education (FAPE) because it failed to develop appropriate individualized education programs (IEPs), as follows:

1. The September 24, 2008 IEP<sup>3</sup> was inappropriate because:<sup>4</sup>

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<sup>1</sup> To maintain a clear record, the closing briefs have been marked as exhibits. Student's brief has been marked as Student's Exhibit 76, and District's brief has been marked as District's Exhibit 77.

<sup>2</sup> The seven issues and twenty-six sub issues, which are at issue in this due process hearing, have been clarified and reframed for clarity, as set forth herein. At the beginning of the due process hearing, Student withdrew the issue of "whether District failed to provide Student with a FAPE because it failed to fully assess Student's behavioral needs, as the District's behavioral assessments conducted by Nancy Hulbert and Bruce Pridgeon in 2009, were inappropriately conducted". Accordingly, the decision does not address this issue.

<sup>3</sup> This IEP was developed prior to the two-year statute of limitations. However, it was the operative IEP in place at the time some of Student's claims arose.

<sup>4</sup> The two-year statute of limitations in this case is February 1, 2009, as a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(D); Ed. Code, § 56505, subd. (l).) Student did not

- a. Goal Number One was inappropriate because Student's baselines were not measureable; and the goal was not properly implemented because the necessary data was not kept by Student's teacher;
  - b. Goal Number Two was inappropriate because necessary data was not kept by Student's teacher;
  - c. Goal Number Five, subsection (a), was inappropriate because Student's baselines were not measurable; and the goal was not properly implemented because the necessary data was not kept by Student's teacher;
  - d. Student's behavioral needs were not properly assessed by District so it could not develop appropriate baselines, goals, and behavioral supports; and
  - e. Student's speech and language services were reduced when it was inappropriate for District to do so;
2. The September 16, 2009 IEP was inappropriate because:
- a. Goals Numbers One through Four were inappropriate in that Student's baselines were not measureable; and the goals were not properly implemented because the necessary data was not kept by Student's teacher;
  - b. Student's behavioral needs were not properly assessed by District so that it could develop appropriate baselines, goals, and behavioral supports; and
  - c. District inappropriately reduced Student's speech and language services;
3. The October 26, 2009 IEP was inappropriate because:
- a. Goal Number One was inappropriate because the baselines were not measurable;

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assert that the statute of limitations was tolled, therefore, this issue is evaluated from February 1, 2009, onward.

- b. Goal Number Two was inappropriate because Student's baselines were not measureable; and the goal was not properly implemented because the necessary data was not kept by Student's teacher;
  - c. Goal Number Three was inappropriate because the baseline cannot be measured when compared to the goal;
  - d. Goal Number Four was inappropriate because Student's baselines were not measureable; and the goal was not properly implemented because the necessary data was not kept by Student's case manager;
  - e. Goal Number Five was inappropriate because necessary data was not kept by Student's teacher;
  - f. District eliminated Student's speech and language services despite Student's failure to meet his speech and language-based goals contained in his IEP of September 24, 2008, and District eliminated speech and language services despite the fact that this IEP contains speech and language-based goals; and
  - g. Student's behavioral needs were not properly assessed by District and therefore it could not develop appropriate baselines, goals, and behavioral supports;
4. The March 11, 2010 IEP was inappropriate because Student's behavioral needs were not properly assessed by District and therefore it could not develop appropriate baselines, goals, and behavioral supports;
5. The May 17, 2010 IEP was inappropriate because:
- a. Student's behavioral needs were not properly assessed by District and therefore it could not develop appropriate baselines, goals, and behavioral supports;
  - b. District denied Student instructional time in lieu of providing him appropriate behavioral support or assessments; and

- c. District failed to offer Student occupational therapy (OT) services;
- 6. The June 10, 2010 IEP was inappropriate because:
  - a. It was developed at an IEP team meeting without Student's general education teacher being present;
  - b. Student's behavioral needs were not properly assessed by District and therefore it could not develop appropriate baselines, goals, and behavioral supports; and
  - c. District failed to offer Student a placement in the least restrictive environment (LRE);
- 7. The October 18, 2010 IEP was inappropriate because:
  - a. Goal Numbers Five and Six were inappropriate because the baselines cannot be measured as they relate to the goals;
  - b. The two mental health goals listed in this IEP contain baselines that were not measurable as they relate to the stated goals;
  - c. Student's behavioral needs were not properly assessed by District and therefore it could not develop appropriate baselines, goals, and behavioral supports, and
  - d. District failed to offer Student a placement in the LRE.

## PROPOSED REMEDY

Student requests an order requiring District to: 1) provide him with compensatory education and academic support in the form of 100 hours of one-to-one tutoring to be provided by a credentialed teacher; 2) transition him back to the LRE of a general education regular classroom in his neighborhood school along with his brothers, with the potential for Resource Specialist Program support for Student's academic deficits; 3) the support of a one-to-one well-trained and supervised Special Circumstances Instructional Assistant (SCIA) who can provide intensive Applied Behavior Analysis (ABA)

intervention for Student's autism to meet his academic, social, and behavioral needs;<sup>5</sup> and 4) other reliefs as deemed appropriate by the ALJ.

## CONTENTIONS OF PARTIES

Student asserts that District denied him a FAPE because, among others, it failed to offer him an educational program that met his behavioral, OT, speech and language, academic and socialization needs. Student contends that District failed to properly assess his behavioral needs to develop appropriate baselines, goals, and behavioral supports, and that District further failed to offer him an functional analysis assessment (FAA) after Mother's request on June 10, 2009, nor create a behavior intervention plan (BIP). Although District conducted a functional behavior assessment (FBA) and created a behavior support plan (BSP) in October 2009, Student asserts that District did not properly conduct the FBA, and that the resultant BSP was not adequate to address his unique needs.

Student contends that District denied him a FAPE because the baseline data statements or the Present Levels of Academic Achievement and Functional Performance (Present Levels of Performance, "PLOP," or "baseline") regarding many of his goals in several IEPs were not measurable, and several goals were either inappropriate or

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<sup>5</sup> According to Student's PHC statement, Student requested that the Positive Behavior Intervention Plan, should be designed by the Board Certified Behavioral Analyst (BCBA), Dr. Randy Ball, who completed the Independent Educational Evaluation (IEE) functional analysis assessment of Student, or if Dr. Ball is not available, by a similarly qualified BCBA of the family's choice. Dr. Ball, or the similarly qualified BCBA, described above, should be responsible for training, supervising, and checking the fidelity of the SCIA for the remainder of the 2011-2012 school year (SY).

improperly implemented. Student alleges that District failed to offer him OT services and that his speech and language services were inadequate. Student contends that District's June 10, 2010 offer of special day class (SDC) placement at Bauer Speck Elementary School (Bauer Speck) was not the LRE, and that Student should have been allowed to remain at Kermit King Elementary School (Kermit King) with additional support and services, including a one-to-one aide.

District asserts that it offered and provided Student with FAPE in the LRE at all relevant times, and therefore, Student is not entitled to any remedy. District contends that it appropriately assessed Student in all areas of suspected disability based on the information available to it, and that it developed IEPs that were reasonably calculated to provide Student with meaningful educational benefit, with goals in the areas of reading, writing, behavior, mental health, and a BSP. District contends that it agreed to provide various IEEs in response to Student's requests, and held multiple IEP team meetings to consider assessment information and address Student's educational needs.

District contends that its offer to place Student at the SDC in Bauer Speck was reasonably calculated to provide him with meaningful educational benefit in the LRE based on his behavioral, social and academic needs. District maintains that it substantially implemented Student IEPs, support and services at all relevant times.

## FACTUAL FINDINGS

### JURISDICTION AND FACTUAL BACKGROUND

1. Student is a seven-year-old boy who resides with Parents within the District's geographical boundaries. He is presently eligible for special education services under the category of specific learning disability and receives services in the areas of speech and language, behavior, OT, and mental health, among others. Student was in

the second grade for 2010-2011 SY and attends the SDC at Bauer Speck Elementary School.

2. At Bauer Speck, Student has a one-to-one aide in the SDC program and his SDC teacher at Bauer Speck is Marylyn Richie. His program comprises of 77 percent special education program with 23 percent mainstreaming. Prior to his placement at Bauer Speck, and during the 2009-2010 SY, Student was in a general education program at Kermit King, receiving regular education academic instruction 87 percent of his school day and specialized instructions outside of the regular education class for 13 percent of the time.

#### SEPTEMBER 24, 2008 IEP (2008-2009 SY)

3. A school district provides a FAPE to a student if its program or placement is designed to address the student's unique educational needs and is reasonably calculated to provide meaningful educational benefit in the LRE. An IEP is evaluated in light of information available to the IEP team at the time it was developed. It is not judged in hindsight.

4. During the 2008-2009 SY, Student was in kindergarten. His eligibility category for special education services, as contained in the September 24, 2008 IEP, was speech and language impairment. Student was placed in a general education program at Kermit King receiving regular education academic instruction 83 percent of his school day and specialized instructions outside of the regular education class for 17 percent of the time. Student participated in the Resource Specialist Program (RSP), where he received math, language art and reading instructions in small group settings. Student's RSP teacher during his kindergarten year (2008-2009 SY) was Stacey Halebsky.

5. As relevant to the issues in this matter, the following goals were included in the IEP:



Goal Number 1 (language). "By 9/09 Student will use appropriate sentence structure during oral communication in class and/or in the therapy setting with 80% accuracy as measured by teacher records and specific data."

Goal Number 2 (math). "By 9/09 Student, when given up to twenty objects, will count recognize, represent, name, order the number of objects with 80% accuracy in 3 of 4 trials as measured by teacher-made tests/teacher-charted data."

Goal Number 5a (behavior). "By 9/09 when participating in a group activity, Student will work cooperatively with peers without disrupting the activity 80% of the time in two of three trials as measured by observation and data collection."

#### ISSUES NUMBERS 1A, 1B AND 1C – GOALS

6. Because this IEP was developed outside the statute of limitation, any issues relating to the development of the IEP, including those issue relating to whether the baseline statement was "measurable" or accurate and reflective of Student's present levels of academic achievement and functional performance at the time it was developed, are barred. Those matters are therefore, not determined herein.

7. Student has not alleged that these goals were not measurable or implementable. Rather, Student contends that the baseline statements for the goals were not measurable, and that the goals were not properly implemented because the necessary data was not kept by Student's teacher. As discussed above, any matter relating to the baseline statement and thus the development of the September 24, 2008 IEP is barred by the statute of limitation.

8. Student offered no persuasive evidence in support of his assertion that the goals were not properly implemented because the necessary data was not kept by Student's teacher. To the contrary, the evidence showed that the goals were implemented appropriately. Ms. Halebsky, Student's kindergarten teacher, who wrote Goal Numbers 2 and 5a, offered persuasive testimony showing she kept data on the goals regarding whether Student could count and recognize names and numbers of objects (Goal Number 1), and how often Student cooperated with peers and participated in group activities (Goal Number 5a), among others.

9. Ms. Halebsky monitored Student's progress by collecting data or documenting in writing, the number of times and frequencies when Student recognized numbers and objects. She kept a behavior chart documenting how Student cooperated and participated with his peers. The data collected about Student was kept in a data file, which was sent with Student to his new school when he transferred. The data was shared with Parents and further discussed and shared at Student's IEP team meetings.

10. Regarding his speech and language needs, the IEP team noted that Student's language delays adversely affect his academic growth and his ability to clearly communicate his thoughts and ideas. Therefore, as part of his program, Student received 200 minutes of speech and language services provided by Robert Bruce Pridgeon, District's Speech and Language Specialist, and 480 minutes of specialized academic instruction monthly.

11. The evidence established that Mr. Pridgeon wrote Student's speech and language goal (Goal Number 1) contained in the September 24, 2008 IEP, implemented it, and worked with Student on that goal. Student's speech and language goal was also addressed in the general education kindergarten class, and in the RSP classroom.

12. Mr. Pridgeon comprised the information for Goal Number 1. He kept data about Student and reported on his progress towards the goal in November 2008, March

2009, June 2009, and on September 16, 2009 (Annual Report). The evidence showed that Student met this goal.

#### ISSUE NUMBER 1D – ASSESSMENT OF BEHAVIOR NEEDS

13. In developing an IEP for special needs students, the district has an obligation to obtain required information about Student including a statement of his present levels of academic achievement and functional performance. However, because of the statute of limitation, any issue relating to the development of the IEP, including the question of whether District had appropriately assessed Student's behavioral needs prior to the development of its September 24, 2008 IEP, is barred. Therefore, the issue relating to the assessment of Student's behavioral need prior to the development of the September 24, 2008 IEP is not discussed or determined herein.

14. At the time the IEP was developed, the team determined that a BSP was not required, but included a behavior goal (Goal Number 5a) in Student's IEP to address his difficulty to stay on task and his wandering behaviors. Based on what District knew about Student's behavior at the time the September 24, 2008 IEP was developed, the evidence established that the low level behavior intervention strategies and behavior goal (redirecting Student to tasks and encouraging his participation in group activities) were appropriate and adequate to address Student's behavior. The evidence showed that the behavior intervention strategies and behavior goal were implemented appropriately.

15. Student's September 24, 2008 IEP included timelines for filing periodic reports on Student's progress towards the goals and a statement of the special education and related services to be provided to Student, as noted above. Progress toward meeting the goals was measured by teacher's records and data collection. Ms. Halebsky demonstrated that she implemented Student's goals appropriately, and that records were kept regarding his progress towards the goals. Based on the data

collected, the goals were reported upon periodically, once about every four months. Student's report card and progress report showed that Student "made tremendous growth ... in academic and behavior" and received meaningful educational benefit. Therefore, the evidence failed to establish that during the 2008-2009 SY, District did not develop appropriate baselines, goals, and behavioral supports for Student.

#### ISSUE NUMBER 1E – SPEECH AND LANGUAGE SERVICES

16. Comparing the September 24, 2008 IEP offer of speech and language services to the speech and language services offer in the November 20, 2007 IEP, Student alleges that his speech and language services were improperly reduced in the September 24, 2008 IEP offer. Again here, this issue relating to whether Student's speech and language services were improperly reduced at the time the September 24, 2008 IEP was developed is barred by the statute of limitation.

17. However, as an ongoing issue, from February 1, 2009, onward, the evidence failed to establish that Student's speech and language services were either reduced or improperly reduced in the September 24, 2008 IEP offer. The evidence established that rather than a reduction, the 200 minutes per month of speech and language services offered in the September 24, 2008 IEP was packaged differently than those offered in the November 20, 2007 IEP. Under the November 20, 2007 IEP, Student would have received a range of between 175 to 630 minutes of speech and language services per month. The per month speech and language services of 200 minutes, offered in the September 24, 2008 IEP was within the range of the speech and language services offered in the 2007 IEP. As no evidence was offered to show the actual speech and language services minutes that Student received per month under the 2007 IEP, or to show that Student received more speech and language services under the 2007 IEP than under the 2008 IEP, a reduction of the speech and language services under the September 24, 2008 IEP was not established.

18. Regardless of the above conclusion, merely comparing one IEP with another is not sufficient to establish that District's speech and language services offer in the September 24, 2008 IEP was insufficient or inadequate to meet Student unique speech and language needs. Student's IEP offer must be based on his unique needs, and thus designed to meet his unique educational needs based on information available to District about Student at the time the IEP offer was made. Here, Student offered no evidence to show that the 200 minutes of speech and language services offered by District in the September 24, 2008 IEP was inadequate to meet his unique needs. Therefore, Student failed to meet his burden to show a denial of FAPE when the offered speech and language services was changed from 175 to 630 minutes per month, to 200 minutes per month.

#### Request for Assessments

19. Pursuant to a written request in a letter dated June 10, 2009, Mother requested a full psycho-educational assessment for Student. Mother requested that Student's academic, cognitive, social behavioral and intellectual functioning be evaluated. In that letter, she also requested an FAA of Student.

#### September 1, 2009 Student Study Team Meeting (2009-2010 SY)

20. Based on the record, District did not respond to Mother's request for assessment until the September 1, 2009 Student Study Team (SST)'s meeting.<sup>6</sup> The SST team discussed various concerns about Student, including his preference to be with

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<sup>6</sup> While Mother requested the assessments in June 2010, the assessments were not completed until October 2010, due to summer recess for District. Mother's request was received at the end of the school year and September 1, 2009, was the beginning of the following school year.

adults rather than children, his low academic performance and low motivation, difficulty following directions, motor skills, impulse control, lack of focus and issue with defying authority. The team decided to provide Student with one-to-one early reading intervention, and summer school program and services to address his handwriting and behavior issues. The SST notes indicated that Parent was requesting testing, and that the team and District offered to assess Student in the areas of behavior, psycho-educational, and speech and language.

September 16, 2009 IEP (2009-2010 SY)

21. During the 2008-2009 SY, Student was in the first grade and in Michelle Keil's general education class. Based on the September 16, 2009 IEP document, Student's eligibility category for special education services remained speech and language impairment. Regarding areas of needs, among others, the IEP document indicated that Student was speaking in incomplete sentences, using vague terminologies at times (speech and language), had difficulty naming the numbers zero to 20 (math), knew his letters, but not all the sounds (reading). Regarding Student's behavior at the relevant time, he was eager to participate in group discussions, raised his hand and called out his answers; however, he often gave incorrect or off-topic answers.

22. The IEP document indicated that Student's behavior was impeding his learning. Regarding ongoing behavior interventions, strategies, and supports for Student, Student's classroom teacher was utilizing a classroom behavior management system with rewards (marbles and points), and Individual Behavior Chart to manage his behaviors. A behavior assessment was also pending.

23. Student was placed in a general education program at Kermit King and provided with accommodations and related services, including Resource Program and Learning Center Reading Program and specialized academic instruction, among others.

He would receive monthly 200 minutes of speech and language services and 480 minutes of specialized academic instruction. He received regular education academic instruction 87 percent of his school day and specialized instructions outside of the regular education class for 13 percent of the time.

24. This IEP was only in place until the October 26, 2009 date of Student's triennial IEP, when another IEP was developed and agreed to by Parents. Student has not alleged that these goals were not measurable or implementable. Rather, Student contends that the baseline statements included in the goals were not measurable. Student further alleges that the goals were not properly implemented because the necessary data was not kept by Student's teacher.

#### Issue Number 2a – Goals

25. Goals were included in the IEP in the areas of language, math, behavior, reading, and following directions. Parent consented to the IEP and signed the IEP on September 16, 2009. As relevant to the issues in this matter, the following goals were included in the IEP:

Goal Number 1 (math). "By 9/15/10, when given numbers in writing up to thirty, [Student] will name the numbers with 80% accuracy in 2 of 3 trials as measured by teacher-made tests/teacher-charted data." For this goal, the baseline statement indicated that Student "knows how to count verbally, but often does not remember the name of the number."

Goal Number 2 (behavior). "By 9/15/10, while participating in class discussion/instruction, [Student] will make appropriate remarks and questions that are relevant to the topic at hand

with 70% accuracy in two of three trials as measured by observation and data collection." Regarding this goal, the baseline statement stated that "[Student] currently is raising his hand, yet calling out his answer. It is reported that often the answer is off topic."

Goal Number 3 (behavior). "By 9/15/10, when given a teacher direction, [Student] will follow directions without arguing with no more than two prompts with 70% mastery in three consecutive trials as measured by teacher/staff observation and documentation." The baseline statement stated that "[Student] chooses to do what he wants in class. He does not follow the teacher's directions."

Goal Number 4 (language). "By 9/10, [Student] will use appropriate word meaning during oral communication in class and/or in the therapy setting with 80% accuracy as measured by specific data collection." For the baseline statement regarding Student's language goal, the IEP provided that "[Student] at times uses generic terms (e.g. "thing" or "stuff"), rather than specific words, when speaking."

26. As discussed above, the law does not require that a PLOP or baseline be measurable. Rather, that the IEP must include a statement of the child's present levels of academic achievement and functional performance, and a statement of measurable annual goals and objectives that are based upon the child's present levels of academic achievement and functional performance. In other words, the baseline or PLOP must be accurate, regardless of whether it is measurable or not.



27. Student failed to establish that the baseline statements did not reflect Student's levels of academic achievement and functional performance at the time they were written. On the contrary, the evidence established that Student's goals and objectives in the September 16, 2009 IEP were based upon baseline information that reflected accurate information regarding Student's levels of academic achievement and functional performance. The baseline statements were based on assessment information, teachers' observations, and Student's cumulative file. The baseline statements were adequate in developing measurable goals for Student at the relevant time, and enabled District's staff to monitor and measure Student progress towards the goals.

28. Student offered no persuasive evidence to support his assertion that the goals were not properly implemented because the necessary data was not kept by Student's teacher. Based on testimonies from several of District's personnel, including Ms. Halebsky and Ms. Keil, Student's first grade general education teacher at Kermit King, data and notes were kept regarding the implementation of the goals and progress. The evidence established that the goals in the September 16, 2009 IEP were measurable, and each was implemented appropriately. Student's behavioral goals and interventions, strategies and supports were implemented in his general education and the RSP classrooms. He received speech and language services or therapy from District's speech and language pathologist, and his math goals were worked upon in both the RSP room and his general education classroom.

29. The evidence established that records were kept regarding Student's progress towards the goals and reported upon periodically. For example, documentary evidence was presented by District showing that progress on Goals Number 2 and 3 were reported upon on March 1, June 4 and November 19, 2010. District established that it had a practice in place for monitoring and reporting on Student's goals, including

those relating to following direction, his behavior, and language and speech needs, which were included in Student's September 16, 2009 IEP and subsequent amendments.

30. Student presented no evidence establishing that his goals in the September 16, 2009 IEP were not appropriately implemented. Based on the totality of the evidence, Student's goals were adequately implemented and monitored by Ms. Halebsky. Necessary data was kept by Ms. Halebsky and other District personnel regarding the goals and Student's progress. Thus, Student failed to establish that Goals Number 1 through 4 in Student's September 16, 2009 IEP were inappropriate based on the grounds that Student's baselines were not measureable, or because and the goals were not properly implemented because the necessary data was not kept by Student's teacher.

#### ISSUE NUMBER 2B – ASSESSMENT OF BEHAVIOR NEEDS

31. Regarding Student's behavior at the time of the IEP, the baseline information reported that Student was calling out his answer and often the answer was off-topic. He would not follow the teacher's directions and would choose to do what he wants in class. The baseline statement was written by District's staff familiar with Student and his disability. District had assessment information about Student's behavior as contained in the previous Preschool Early Intervention Assessment dated November 17, 2006. As part of that assessment, Parents' interview was conducted, Student was observed, a play assessment was conducted and various assessment tools were utilized. Student was reported as having warmed-up to new surroundings, readily participated and talked in the assessment, and his participation was considered to be adequate in all areas of activities presented, with the exception of oral motor skills, which he refused. His eye contact was reported to be appropriate, attempted to use his language to comment on things and requests, and used greetings. His language use was reported to be limited, but showed good joint attention skills during the assessment. Based on that

early intervention assessment, Student was found eligible for special education services under the category of speech and language impairment, due to his delays in language skills. No behavior deficit was noted based on the assessment results.

32. Because that assessment was still less than three years at the time of the IEP, additional behavior assessment of Student was not legally required unless one was requested by Parents or otherwise necessitated by new behavior occurrences or Student's needs. At the time of the September 16, 2009 IEP team meeting however, Parents had requested additional assessments of Student including a behavior assessment. Those assessments requested in Parents' June 10, 2009 letter were pending at the time of this IEP team meeting.

33. The evidence established that the baseline statements included in Student's behavior goals were written by District's staff familiar with Student and his disability, based on Student's teachers and District employees' observation and data collection about his behavior in the education setting, and was from District's staff familiar with Student's disability and behavior needs. The staff had knowledge of Student's PLOP at school and the PLOP was discussed at Student's IEP team meeting with required members and Parents. At the time of the development of the September 16, 2009 IEP, District had adequately and appropriately assessed Student and was in the process of completing additional assessments requested by Parents. Student failed to present evidence to show how or why the information District had about his behavior, at the time of the September 2009 IEP, was either inaccurate or inadequate to develop the interventions included in the IEP. The IEP team members, including Parents, discussed the question of whether Student's behavior was impeding his learning; it was determined that it was and behavior interventions, strategies, and supports were being utilized for Student in the classroom. Based on what District knew about Student's behavior at the time the September 16, 2009 IEP was developed, the evidence

established that the behavior intervention, strategies and behavior goal District was using were appropriate and adequate to address Student's behavior.

34. Based on prior assessment and other information available about Student, the IEP team, including Parents, had the necessary performance or objective evaluation information about Student's behavior at the time the IEP and behavior goals were developed. Parents fully participated in the development of the IEP. The evidence showed that District had accurate baseline statement or PLOP information about Student at the time of the September 16, 2009 IEP. The PLOP was reflective of Student's performance level in behavior, and the PLOP was sufficient to support the development of measurable behavior goals and objectives for Student at the time the September 16, 2009 IEP was developed.

35. Student offered no evidence to support a finding that Student's pragmatics skill, autism or "autistic-like-behavior" were areas of suspected disability at the time of the September 16, 2009 IEP. Based on the existing assessment report at the time, Student warmed up to new surroundings, readily participated and talked, had appropriate eye contact, used greetings, and showed good joint attention skills, among others. While having these skills does not automatically mean a child does not have autism, Student's skills established that autism was not an area of suspected disability in September 2009. Thus, Student failed to establish that his behavioral needs were not properly assessed by District so that it could not develop appropriate baselines, goals, and behavioral supports. To the contrary, the evidence supports a finding that at the time of the September 16, 2009 IEP, District had adequately and appropriately assessed Student. Therefore, Student failed to meet his burden on this sub-issue.

#### ISSUE NUMBER 2C – SPEECH AND LANGUAGE SERVICES

36. Student alleged that the District improperly reduced his speech and language services. As discussed above, regarding the September 24, 2008 IEP, the

evidence failed to establish that Student's speech and language services were reduced or improperly reduced. The September 16, 2009 IEP continued the offer of 200 minutes of speech and language services in a group session. Student did not present sufficient or persuasive evidence to show that District's speech and language services offer in the September 16, 2009 IEP was insufficient to meet his unique speech and language and educational needs. Therefore, Student failed to meet his burden establishing that his speech and language services improperly reduced or inadequate to meet his known speech and language needs.

#### DISTRICT'S ASSESSMENTS OF STUDENT

37. Based on the SST meeting offer, Student was assessed in the areas of behavior, psycho-educational, and speech and language on October 26, 2009. The behavior assessment was conducted by District's School Psychologist, Jessica Munoz; the psycho-educational assessment by District's Educational Psychologist, Nancy Hulbert; and the speech and language assessment by District's Speech and Language Specialist, Robert Bruce Pridgeon. Following the assessments, an IEP team meeting was held on October 26, 2009, to review the assessments results and develop an IEP for Student.

#### SPEECH AND LANGUAGE ASSESSMENT

38. Assessments must be conducted by persons who are knowledgeable and competent to perform the assessment, as determined by the school district. Tests and assessment materials must be used for purposes for which they are valid and reliable, administered in conformance with the instructions provided by the producer of the tests, and in the language and form most likely to yield accurate information. No single measure can be used as the sole criterion for determining whether a student is eligible or whether a particular special education program is appropriate. An IEP team meeting

to review the assessment must occur within 60 days of receipt of parental consent for the assessment.

39. Mr. Pridgeon has both bachelor and master's degrees in communicative disorders and holds a "Clinical-Rehabilitative Credential: Speech, Language, and Hearing, including Special Class Authorization." He has been employed by District since 1988. While at District, he worked as a special education SDC teacher for two years, and since 1991, has worked as District's Speech and Language Specialist. He has experience in conducting assessments and providing services to special needs students in the area of speech and language needs.

40. As part of the triennial reevaluation, Mr. Pridgeon administered several tests, including the Peabody Picture Vocabulary Test – Revised (Peabody) to assess Student's receptive knowledge of words' meanings, and the Clinical Evaluation of Language Fundamentals, Fourth Edition – Revised (CELF-4) to assess Student's basic foundations of form and content characterizing mature use of language. He also administered the Oral and Written Language Scales (OWLS) to assess his receptive and expressive language skills, the Comprehensive Assessment of Spoken Language (CASL) test to assess Student's in-depth oral language skills and pragmatic judgment and skills, and the Goldman-Fristoe Test of Articulation (GFTA) was administered to assess Student's articulation.

41. The assessment result showed that Student performed in the average range for his age in all areas assessed, including vocabulary based on the Peabody, core language (receptive language, expressive language and language structure) based on the CELF-4, listening comprehension and oral expression based on the OWLS, pragmatic judgment and skills based on the CASL as Student demonstrated the ability to use his language skills for given social situations or settings in age appropriate manner, and articulation based on the GFTA. Even though certain sound errors were noted in the

GFTA, those were considered typical and normal for his age. Based on the CELF-4 and OWLS, Student showed no significant difference between his receptive and expressive language skills, and the tests indicates a typical or normal pattern of language development in Student. Therefore, Mr. Pridgeon concluded that Student did not qualify for speech and language services as of the October 26, 2009 IEP.

42. Other than disagreeing with the results of the speech and language assessment and the recommendations of the assessor, Student did not allege that the assessment was conducted improperly or that the assessor unqualified to conduct the assessment or administer any of the assessment tools or tests, and the evidence established that the speech and language assessment complied with the legal requirements, and appropriately assessed Student's areas of known and suspected disability relating to speech and language. Prior to his assessment of Student, Mr. Pridgeon had worked with Student regarding his speech and language needs for over a year, and had monitored his IEP goals. Based on the assessment and his prior work with Student, Mr. Pridgeon had adequate knowledge about Student's disability and language needs. Therefore, the speech and language assessment was appropriate, and Student speech and language needs were appropriately assessed.

#### BEHAVIOR ASSESSMENT

43. In the case of a student whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior. Decisions about interventions, supports, and strategies to be implemented must be made on an individual basis by the student's IEP team. Behavioral interventions are "systematic implementation of procedures that result in lasting positive changes in the individual's behavior ...."

44. The school district must conduct an FAA, resulting in a BIP, when a student develops a "serious behavior problem," and the IEP team finds that the instructional and behavioral approaches specified in the student's IEP have been ineffective. A behavior intervention plan is required when a student exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the student's IEP. A serious behavior problem means the individual's behaviors are "self-injurious, assaultive, or the cause of serious property damage" and other "severe behavior problems" that are pervasive and maladaptive for which instructional or behavioral approaches specified in the pupil's IEP are found to be ineffective.

45. Parents requested an FAA on June 10, 2009, but the IEP team determined that an FBA was more appropriate based on known behavior issues in Student at the time. Parent signed off on the assessment plan that had an FBA. At the time the behavior assessment was requested by Parents, known behavior concerns for Student included noncompliance or refusal to follow directions, and disruptive behaviors, which was explained to mean that Student was getting out of seat and walking around the



classroom.<sup>7</sup> Parents also expressed concerns that Student's behavior may be impeding his peer relationships and "social standing within his peer group." Comparing Student's current behavior at the time, with his past behavior, Student's behavior showed "improvements" in the current year, as there were noted "reductions in frequency and intensity of problem behavior." The evidence failed to establish that Student's behaviors that were known to District, or which District should have suspected, prior to and at the time of the September 16, 2009, were such that would require an FAA, rather than an FBA. The behaviors were not "serious behavior problems," and were not self-injurious, assaultive, or causing serious property damage. Therefore, the decision to conduct an FBA at this relevant period was appropriate and supported by the evidence.

46. Therefore, at the time of the October 26, 2009 IEP, the evidence failed to show that Student had serious behavior problems, requiring an FAA. No evidence was offered by Student to show that his behaviors at the time were either self-injurious, assaultive, or causing serious property damage so as to require an FAA. The evidence failed to show that the behaviors were severe, pervasive and maladaptive for which

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<sup>7</sup> Prior reported/documented behaviors for Student included "elopement or attempting to elope" from his classroom or play yard, refusing to come into the classroom after recess ended, "episodes of high emotionality" including "crying or anger," and an inability to be comforted when sad or inability to calm when angry." Elopement was noted to be a past behavior, and "emotionality," a present concern. Student was reported to display "unsafe behavior" when Student was in a "negative mood state." His unsafe behavior included Student's throwing items (aggression), wandering, and leaving supervised areas. These were included in Student's behavioral histories, and Student was no longer exhibiting some of the behaviors at the time of the September 16, 2009 IEP team meeting.

“instructional or behavioral approaches specified in the pupil’s IEP had been ineffective”. To the contrary, the evidence showed that Student had shown improvements regarding his behavior in the current year, and there were reductions in frequency and intensity of past behavior problems. Therefore, Student failed to establish that, at the time of the October 26, 2009 IEP, he required an FAA rather than the FBA, which District offered and conducted.

### FUNCTIONAL BEHAVIOR ASSESSMENT

47. Pursuant to Parents’ request for a behavior assessment, Jessica Munoz, District’s School Psychologist, conducted the FBA on October 26, 2009.<sup>8</sup> To identify target behaviors to be assessed, Ms. Munoz observed Student, interviewed Parents, spoke with his teachers and reviewed records regarding his (past and current) behaviors.

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<sup>8</sup> Ms. Munoz has a bachelor’s degree in psychology and a master’s degree in educational psychology with “specialization” in school psychology. She holds a “Professional Clear Pupil Personnel Services” credential, the Behavior Intervention Case Manager (BICM) certification, and a “CPI – Nonviolent Intervention” certification. Ms. Munoz has worked with and/or at District since 1995. She was a School Psychologist Intern from 1995 to 1996, School Psychologist from 1996 to 2008, and Program/Behavior Specialist from 2008 to the present. As a Behavior Specialist, part of her job is to assist special education case managers in the development of BSPs and IEPs, and train staff in special education. As a School Psychologist, she provided psychological services to students, as well as assessments and/or evaluations. She participated in IEP team meetings and consulted with parents and teachers in developing behavior plans and interventions. She is qualified to conduct behavior assessments for special needs students.

According to the information gathered in this process, Ms. Munoz identified the target behavior to be assessed in the FBA as “unsafe classroom behavior,” defined as Student’s unexcused out-of-seat actions, and his item-throwing behaviors.

48. As part of her assessment, Ms. Munoz conducted a detailed review of Student’s records, including assessments reports, ecological information, prior IEPs and individual behavior charts for Student, and interviewed Parents and relevant District’s staff members. She conducted three observations of Student on September 22, October 8 and October 17, 2009.

49. Based on the direct observation data, Student generally exhibited appropriate classroom behavior. Ms. Munoz noted that initiating work and sustaining on-task attention for academic work were weak areas for Student when not supervised. With adult attention, there were improvements in those areas. She reported that even though Parents and staff had reported improvement since the beginning of the school year, concerns persisted as to unsafe behaviors. Thus, she concluded that BSP and behavior goals would be written for Student and presented them to the IEP team for consideration.

50. The FBA and BSP identified Student’s patterns of behaviors. For example, problems behaviors are most likely when Student began his school day agitated, with such problem behavior continuing and increasing as the day progressed. If Student’s school day began well, his behavior incidents were of low intensity. Regarding the environmental factors affecting Student’s behaviors, “entering the class in an agitated state,” transition from play to work, and limited access to preferred adults were all antecedents to behavior incidents for Student.

51. The BSP concluded that Student exhibited problem or negative behaviors in order to escape from a “negative internal state” such as anger or agitation, and sometimes, to gain attention or seek comfort in the form of individual attention from a

preferred adult. In developing supports for Student, Ms. Munoz recommended that avenues should be developed for Student to gain individual attention from a preferred adult when agitated, adequate positive reinforcement system should be put in place, and coping strategies should be taught Student in order to manage negative emotions. Thus, BSP included such interventions as the development of positive reinforcement system for Student, school-based counseling to teach, model and practice coping strategies to Student, and providing Student with appropriate means to gain individual attention from a preferred adult when agitated. Student would be taught how to recognize when he is agitated and coping strategies to address such state of agitation. He would model and rehearse coping strategies in a school-based counseling setting, as well as coached with reinforcement the use of coping strategies in the classroom setting. Movement and activities breaks would also be provided to Student as a way to teaching him self-soothing skills, and to help him with focus and direct his high energy.

52. Based on the totality of the evidence, District's FBA, and the accompanying BSP for Student, appropriately assessed Student's behavior needs. It identified relevant behavior triggers, environmental and ecological information prompting or affecting Student's behavior, as well as the functions of Student's behaviors, among others. Relevant and appropriate interventions were developed to address those known and targeted behaviors in the FBA and BSP.

53. The evidence established that District conducted a timely and appropriate FBA of Student, which complied with all legal requirements. The FBA provided information to address Student's behavior needs and included observations of Student in the classroom. It was conducted within the timeframe required by law. Student's behavior was appropriately assessed, including his problem with impulse control, lack of focus, difficulty following directions, and defiance of authority. Therefore, District

conducted a timely and appropriate FBA of Student, which complied with all legal requirements, and provided information to address Student's behavior needs.

#### OCTOBER 26, 2009 IEP (2009-2010 SY)

54. The October 26, 2009 IEP team continued to find Student eligible for special education services, but his eligibility category was changed to Specific Learning Disability following Mr. Pridgeon's speech and language assessment that found Student not eligible for speech and language services. The IEP team determined that Student had a processing disorder relating to attention. Regarding areas of needs, the IEP document indicated that Student could now name 18 of 21 sounds. He was blending some words very slowly (speech and language), leaving some spaces between his words, forgetting punctuations, and reversing some letters when writing. His writing was reported to be large and not always written on the lines of the paper. Regarding his behavior, as in the September 16, 2009 IEP, he was reported to be eager to participate in group discussions, raising his hand, calling out his answers in class, and usually giving incorrect or off-topic answers. He had trouble waiting his turn, was becoming annoyed and losing his temper, and he sometimes annoyed others on purpose. The behaviors were reported to be decreasing at the time of the IEP compared to what was reported in the previous year.

55. Student's reported behavior was impeding his learning and the team decided to adopt the BSP developed by Ms. Munoz, as part of his IEP. Student was exhibiting some "unsafe behaviors" as defined in the included BSP, but that the classroom teacher was using a "3 tier behavior system" including interventions and positive reinforcement as addressed in the BSP.

56. Regarding placement, Student remained in a general education program at Kermit King with provided accommodations and related services, including Resource Program, Learning Center Reading Program and specialized academic instruction,

among others. He would receive 480 minutes of specialized academic instruction each, in writing, reading specialist and reading. He would continue to receive regular education academic instruction 87 percent of his school day and specialized instructions outside of the regular education class for 13 percent of the time. Speech and language services were eliminated by the IEP team based on the result of District's triennial speech and language assessment. Parents signed and consented to the IEP on October 26, 2009, while indicating that they disagreed with the result of the October 26, 2009 speech and language assessment. Otherwise, the evidence failed to show that Parents objected to the removal of speech and language services from Student IEP dated October 26, 2009. They requested an IEE in the area of speech and language assessment.

#### ISSUES NUMBERS 3A THROUGH 3E – GOALS

57. Goals were included in the IEP in the areas of math, behavior, writing, and reading. As relevant to the issues in this matter, the following goals were included in the October 26, 2009 IEP:

58. Goal Number 1 (writing). "By 10/10, when given letters, words, and sentences from a written model/direction, [Student] will use correct letter formation and spacing with 80% accuracy in 3 trials as measured by student work samples." The baseline statement included with the goal provided that "[Student] leaves some spaces between his words, uses capitals, but forgets punctuation. He does reverse some letters - BDPQ. His writing is large and not always written on the lines of the paper."

59. Goal Number 2 (behavior). "By 10/26/2010, [d]uring a 20 minute classroom observation involving oral participation, [Student] will wait quietly/raise hand & wait to be called on before speaking or volunteering responses without being called on (following teacher direction/structure for that activity) with no more than 1 reminder/prompt on 3 out of 5 trials as measured by direct observation by support

staff." The baseline statement included with the goal provided that "[Student] began his school year with frequent blurts including comments or answers when the desired behavior was to raise his hand and wait to be called on. Recent observation suggests that [Student] can meet the expectation to wait quietly with hand raised and remain quiet until called on. He was observed to remain appropriately quiet & attentive when not called on. However, he did exhibit calling out on par with peers when the structure permitted this type of oral participation."

60. Goal Number 3 (behavior). "By 10/26/2010, [w]hen given a one to two step direction during his Language Arts instruction to complete a task such as read, write, or provide a verbal response (such as blending sounds, etc.), [Student] will initiate the task within 10 seconds and require no more than 1 verbal prompt on 3 out of 5 trials as measured by direct observation by support staff." The baseline statement included with the goal provided that "Observations completed during Language Arts instructions revealed [Student] frequently requires additional verbal prompting to initiate academic work/participation. It is estimated that, given a one to two step direction to read, write, or participate in a verbal response (such as blending sounds, etc.), [Student] required up to 3 verbal prompts to initiate the task 3 out of 5 trials."

61. Goal Number 4 (behavior). "By 10/26/2010, [w]hen in a calm state and direction by familiar staff, [Student] will employ a coping strategy taught & rehearsed through school based counseling (i.e. access preferred adults through appropriate means, time away and/or movement breaks) with coaching and no more than 2 prompts on 2 out 5 practice trials as measured by specific data collection collected by the Case Manger." The baseline statement included with the goal indicated that "Last year, staff recalls repeated events in which [Student] employed unsafe behaviors to escape negative emotions. Behaviors repeated, in part, due to limited coping strategies. Currently, unsafe behavior continues but is less frequent & less intense. Coping

strategies to manage negative emotions continues to be an area of need to prevent escalation of behavior.”

62. Goal Number 5 (reading). “By 10/10, when given up to three sounds, [Student] will blend the sounds orally into words or syllables with 80% accuracy in 3 consecutive trials as measured by teacher-charted observations/data.” The baseline statement included with the goal provided that “[Student] can say the sounds in isolation. He has difficulty blending sounds. He is currently in a [“SIPPS”<sup>9</sup>] reading group with the reading specialist program. He is reading sight words on list 2. His running record is 1.”

63. As discussed earlier, because the law does not require that PLOP or baseline be measurable, just accurate, Student failed to meet his burden on this sub-issue. Student failed to establish that the baseline statements did not reflect Student’s levels of academic achievement and functional performance at the time they were written. On the contrary, the evidence established that Student’s goals and objectives contained in the October 26, 2009 IEP were based upon baseline information that reflected accurate information regarding his levels of academic achievement and functional performance. The baseline statements included in Student’s IEP goals were based on assessment information, teachers’ observations, and Student’s cumulative file, that were available at the time the IEP goals were written. The baseline statements were adequate in developing measurable goals for Student, and enabled District’s staff to monitor and measure his progress on the goals.

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<sup>9</sup> “SIPPS” (Systematic Instruction in Phoneme Awareness, Phonics, and Sight Words) program is a decoding curriculum that teaches the prerequisites for developing reading fluency and comprehension for struggling readers.



64. Regarding Goals Numbers 2, 4 and 5 (and even Goals Numbers 1 and 3), Student offered no persuasive evidence in support of his assertion that the goals were not properly implemented because the necessary data was not kept by Student's teacher. Based on testimonies from several of District's personnel, including Ms. Richie and Ms. Halebsky, data was kept regarding the implementation of the goals and progress. The evidence established that the goals in the October 26, 2009 IEP were measurable, and each, except Goal Number 4, (discussed below) was implemented appropriately. Records were kept regarding Student's progress towards the goals and reported upon periodically. District was able to measure Student's progress and progress reports on the goals were made on February 24, March 1, June 4, and November 19, 2010. Thus, District established that it had a practice in place for monitoring and reporting on Student's goals, including those goals contained in the October 26, 2009. District followed this policy and practice by monitoring, collecting data and reporting on Student's progress regularly.

65. Based on the evidence, Student teacher, Ms. Halebsky, demonstrated that she appropriately implemented Student's goals, monitored the goals and reported on Student's progresses regularly and periodically. Based on data collected from working with Student on these goals, reporting on Student's progresses was done once about every four months. Student presented no evidence showing that his goals in the October 26, 2009 IEP were not appropriately implemented, as alleged. On the contrary, the evidence established that the goals were implemented, monitored, and necessary data was kept by District's personnel regarding the goals and Student's progress. Thus, Student failed to establish that Goals Numbers 1 through 5 in Student's October 26, 2009 IEP were inappropriate based on these grounds.

### ISSUE NUMBER 3F – SPEECH AND LANGUAGE SERVICE ELIMINATION

66. Regarding Student's contention that District eliminated Student's speech and language services despite Student failure to meet his speech and language-based goals contained in his IEP of September 24, 2008, and that District eliminated speech and language services despite the fact that this IEP contains speech and language-based goals, the evidence failed to support these assertions.

67. First, Student presented no evidence to show that he failed to meet his speech and language goal contained in the September 24, 2008 IEP. That goal required Student to "use appropriate sentence structure during oral communication in class and in the therapy setting with 80% accuracy as measured by teacher records and specific data" as of September of 2009. Based on the annual review conducted in October 2009, Student was shown to have met this goal. Therefore, Student did not establish that District eliminated Student's speech and language services despite his failure to meet his speech and language-based goals contained in his IEP of September 24, 2008.

68. Also, the evidence failed to establish that the October 26, 2009 IEP contained speech and language goals. Goals Number 3 and 5 in the October 26, 2009 IEP, which Student contends are "speech and language-based goals" were written by the IEP team to specifically address Student's behavior and reading issues, respectively. Thus, the evidence does not show that Student's October 26, 2009 IEP contained speech and language goals.

### ISSUE NUMBER 3G – ASSESSMENT OF BEHAVIOR NEEDS

69. District must assess Student in all areas of suspected disability, and as in this case, behavior. Assessments must be conducted in Student's primary language, and by persons who are knowledgeable and competent to perform the assessment, as determined by the school district. Tests and assessment materials must be used for

purposes for which they are valid and reliable, administered in conformance with the instructions provided by the producer of the tests, and in the language and form most likely to yield accurate information. No single measure can be used as the sole criterion for determining whether a student is eligible or whether a particular special education program is appropriate, among others.

70. Student contends that his behavioral needs were not properly assessed by District and therefore District could not have developed appropriate baselines, goals, and behavioral supports. This assertion is also lacking in credible proof. At the time of the October 26, 2009 IEP, Student's known behavior issues included noncompliance or refusal to follow directions and disruptive behaviors, which was explained to mean that Student was getting out of seat and walking around the classroom. District conducted an FBA of Student, a process that involved gathering relevant information about Student's behaviors from his Parents, teachers, as well as a review of records including past assessment reports and behavior charts. The assessor conducted three observations of Student and collected data regarding target behaviors for analysis and interpretation of the FBA report.

71. District conducted a timely and appropriate FBA of Student, which complied with all legal requirements, and provided information to address Student's behavior needs. The FBA included observations of Student in the classroom, and was conducted within the timeframe required by law. Student's behavior was appropriately assessed, including his problem with impulse control, lack of focus, difficulty following directions, and defiance of authority.

72. Nancy Hulbert, District's Educational Psychologist, conducted the psychoeducational assessment of Student. Among other standardized testing, she administered the Adaptive Behavior Assessment System, Second Edition (ABAS-2) and the Behavior Assessment System for Children, Second Edition (BASC-2) to assess

Student's behavior. The ABAS-2 focuses on behavioral adaptive skills and social functioning, but the BASC-2 assessed both adaptive and problem behaviors. Regarding the reason for assessment referral, Ms. Hulbert indicated that areas of concern included Student's low academic and motor skills, his problems with impulse control, and lack of focus. His low motivation and difficulty following directions, defiance of authority and his tendency to gravitate towards adults rather than peers would be assessed. As reported by Parents and teacher, Student's issues with "aggression", anger control and emotional self-control, his tendency to lose temper too easily, to throw tantrums, annoy others on purpose, his inability to wait turns, issues with breaking other children's things, and bothering others while working, would also be evaluated and targeted for interventions. Parents reported behaviors such as "bullies others," threatened to hurt others, hit other children, and was cruel to animals, among others. Despite all these listed behaviors in Student, at the time of the assessment and the IEP of October 26, 2009, the psychoeducational assessment result did not show, and the evidence presented at the hearing, failed to establish that Student had a "serious behavior problem" that significantly interfered with Student accessing his education and receiving a FAPE. The evidence also failed to show that, other than as discussed above, Student exhibited any of bullying others, threatening to hurt others, hitting other children, and cruelty to animals behaviors, among others, at school. Based on the BASC-2, Student was reported by the raters to be at-risk for aggression and clinically significant for anger control. Overall, Student's behavior was found to be much improved from the prior year. Ms. Hulbert recommended a BSP for Student, and special education services including remedial reading, counseling, accommodations and strategies. Ms. Hulbert indicated that a referral for County Mental Health services would be made, if Parents requested, due to those behaviors that Parents reported, but which Student did not display at the school setting.

73. At the hearing, Dr. Randal G. Ball,<sup>10</sup> a witness called by both parties, who conducted an independent FAA of Student between December and January 2011, appears to believe that Ms. Hulbert's FBA was lacking because her report failed to present certain information (i.e. behavior antecedents and the functions of Student's behaviors, among others) in certain form. His opinion is not persuasive in this regard. Rather than expressing his preference for how he personally would have written the FBA, Dr. Ball failed to identify a source of his information for his insistence that the FBA must follow particular written patterns or guidelines. While FAAs must follow statutorily-prescribed guidelines as to how, when and where an FAA must be conducted, and what information and how such information may be presented in the report, and even how interventions must look, such requirements are lacking for FBAs, in law and practice. As discussed in Legal Conclusion 22, federal law does not have any specific requirements for a functional behavior assessment. As noted previously, at the time the BSP was developed Student's behavior problems were lessening in frequency and intensity, and he did not require a BIP because he did not exhibit a serious behavior problem that significantly interfered with the implementation of the Student's goals.

74. The FBA identified relevant behavior triggers, antecedents, environmental or ecological information affecting Student's behavior, as well as the functions of

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<sup>10</sup> Dr. Ball is a California licensed Marriage and Family Therapist. He has a doctorate degree in education with "specialization" in counseling and educational psychology. He is also a Board Certified Behavior Analyst. Dr. Ball's work focuses on evaluating children with Learning Disorders, Attention Deficit Hyperactive Disorder, Attention Deficit Disorder and Developmental Disabilities, among others. He is a member in good standing with many professional organizations in California. He is a qualified assessor for assessments of behavioral needs in special needs students.

Student's behaviors, among others. Relevant and appropriate interventions were developed to address those known and targeted behaviors in the FBA and his BSP. Thus, the evidence established that District conducted a timely and appropriate FBA of Student, which complied with all legal requirements.

75. The evidence established that at the time of the development of the October 26, 2009 IEP, District had accurate baseline information about Student's behaviors, sufficient to support the development of measurable behavior goals and objectives for Student for the October 26, 2009 IEP. Therefore, Student failed to establish that his behavioral needs were not properly assessed by District so that it could not develop appropriate baselines, goals, and behavioral supports for the October 26, 2009 IEP.

76. Regarding the BSP and its implementation, Dr. Ball was persuasive in his opinion that Student's BSP would have been difficult to implement based on the way the report was presented, and how some interventions were written in the BSP. For example, adequate specific information was not included in the BSP regarding what each staff must do to implement the coping and self-soothing strategies needed to address Student's unsafe behaviors. Ms. Munoz who conducted the FBA and developed the BSP, admitted at the hearing that the BSP dated October 26, 2009, may have been difficult to implement, as the information provided regarding the self-soothing techniques to be employed to calm Student were "not specific enough." Talking with District staff, she was not confident that staff could identify the strategies to be used, skills to be taught, so that progress could be measured. Ms. Munoz explained that the BSP was revised on May 21, 2010, to make the self-soothing interventions described in the October 2009 BSP more specific and easier to implement. However, District's staff and teachers who implemented Student's BSP credibly testified that they were able to, and indeed implemented Student BSP, and the supports, services and interventions

prescribed. The evidence established that the goals were implemented and monitored, and data was collected and reported upon regarding the implementation and Student's progress.

77. Nonetheless, no issue has been raised by Student regarding the implementation of the BSP or the implementation of the behavioral goals, either on the grounds that the goals were improperly written, or that the goals were not measurable or implementable. Rather, Student challenged the appropriateness of the goals, either based on the allegation that the goals were not properly implemented because the necessary data was not kept by implementing staff and Student's teachers, and because the baselines were not measurable. The evidence failed to support these particular contentions.<sup>11</sup>

#### MARCH 11, 2010 IEP ADDENDUM

78. The March 11, 2010 IEP Addendum was called to review the results of two recently completed IEEs in the areas of speech and language, and audiology, by Karyn Lutes and Carol Atkins, respectively. At that IEP team meeting, the team decided to amend Student's IEP, by adding services and recommending additional services. Student would receive increased academic services in reading, four times per week, 30 minutes per session, for a total of 480 minutes per month. The IEP note indicated that Student would receive social skills group training one time per week, 30 minutes per session. His

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<sup>11</sup> The issue of whether Student was denied a FAPE because certain parts of his BSP were "not implementable" or "sufficiently implementable," because certain interventions or strategies may not be written in specific enough terms to provide the staff adequate implementing information, was not raised in this matter, and thus not addressed in this decision.

behavior and the behavior plan revision were discussed. The team recommended an OT assessment, and offered Student a mental health assessment. Parents and required District's members of Student's IEP team participated in the IEP team meeting of March 11, 2010. Parent consented to the IEP amendment.

#### ISSUE NUMBER 4 – ASSESSMENT OF BEHAVIOR NEEDS

79. Student failed to offer any evidence showing that, at the time of the March 11, 2010 IEP, District was aware of additional behaviors, which had not been assessed, or for which an additional assessment was required. The evidence established that at the time of the development of the March 11, 2010 IEP Addendum, District had adequately and appropriately assessed Student. It had accurate baseline statement or PLOP information about Student that was reflective of his performance level in behavior and sufficient to support the development of measurable behavior goals and objectives for the March 11, 2010 IEP. Therefore, Student failed to establish that his behavioral needs were not properly assessed by District so that it could not develop appropriate baselines, goals, and behavioral supports for the March 11, 2010 IEP Addendum. Thus, Student failed to meet his burden on this issue.

80. At the time of the March 11, 2010 IEP Addendum team meeting, District had conducted a timely and complete FBA dated October 26, 2009, which complied with all legal requirements for an assessment, and provided information to address Student's behavior needs. As a result of the FBA, a BSP was developed for Student and that BSP was in place at the time of this IEP team meeting.

#### APRIL 22, 2010 INCIDENT AND APRIL 26, 2010 IEP ADDENDUM

81. On April 22, 2010, Student held up a pair of scissors to his throat and threatened to kill himself. As a result of this incident, District contacted the San Luis



Obispo County Mental Health Services, Mental Health Crisis Intervention unit, and Student was removed from school for a mental health evaluation and hold.

82. Following the incident, Student's IEP team met on April 26, 2010, to discuss the incident, review Student's placement and services, and determine whether the placement continued to be appropriate for Student.<sup>12</sup> At this IEP team meeting, the team decided to change Student's placement, and Student was placed on a modified school day schedule due to his mental health state and perceived school pressure. The modified schedule would ensure his academics were addressed until the next IEP team meeting. Parents participated in the IEP team meeting of April 26, 2010, and consented to the IEP addendum.

#### MENTAL HEALTH ("AB 3632") ASSESSMENT

83. Student's mental health assessment was conducted by the San Luis Obispo County Health Agency, and completed on May 12, 2010. As part of this assessment, Student's IEPs, prior assessment reports and BSP, medical and psychiatric histories, among others, were reviewed. In the assessment reports, it was reported that Student was friendly, adventurous, good with adults and good at math, but his mood was irritable, with a congruent affect, a blunted intensity and a restricted range of emotion. His judgment and insight were found to be impaired. Therefore, the report concluded that Student's behavior problems were chronic, causing impairments academically,

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<sup>12</sup> Prior to the April 22, 2010 incident, other behaviors of concerns had been observed in Student. For example, on April 13, 2010, Student left his classroom unexcused, knocked over some backpacks, and refused staff's intervention to bring him back to the classroom. Additionally, on May 4, 2010, Student engaged in similar behavior and was reported to have spat on Ms. Halebsky.

socially and emotionally. Student had a history of mental health treatment and had been treated in 2008 and 2009. Student was determined eligible for mental health services, and therapy and medication was recommended. The causes of Student's mental issues were not identified or discussed in the report, but issues relating to improved concentration, self-soothing, self-modulating and anger management techniques, impulse control, and relationships with peers would be additionally addressed in therapy.

84. The report indicated that Student could benefit from a smaller, more structured academic setting. Goals were recommended for Student in the areas of concentration improvement, self-soothing, self-modulating and anger management techniques, impulse control and improving relationships with others. It was reported that Mother did not believe that Student was suicidal, and that she believed that the April 22, 2010 incident was "misunderstood." Otherwise, no issue was raised regarding the appropriateness of the mental health assessment.

#### MAY 17, 2010 IEP ADDENDUM

85. This IEP Addendum team meeting was held to review Student's modified school schedule placement. The team discussed Student's safety and determined that Student would continue his modified school day schedule until May 21, 2010, when another IEP team meeting was to be held. The team determined that, at the upcoming IEP team meeting, Student's OT, mental health and behavior plans, as well as placement options through the end of the SY would be discussed. Supports and services would be provided to Student to keep him safe. Parents and required District members of Student's IEP team participated in the IEP team meeting of May 17, 2010. Parent consented to the IEP addendum.

## ISSUE NUMBER 5A – ASSESSMENT OF BEHAVIOR NEEDS

86. As with the October 26, 2009 and the March 11, 2010 IEPs, Student failed to meet his burden on this sub-issue. Prior to, and at the time of the May 17, 2011 IEP team meeting, Student's behavior needs had been adequately and appropriately assessed in addition to the information District had through its personnel observations from working with Student. Following the April 22, 2010 incident, District referred Student for mental health assessment and services. His behavior was evaluated in this process, and the team decided to change Student's placement, both temporarily and for the coming SY, based on assessments' recommendations, including those from the mental health assessment of May 12, 2010. Even though the April 22, 2010 incident could be described as a serious behavior incident, a necessary element was not established; a finding by the IEP team that the instructional and behavioral approaches specified in the student's IEP had been ineffective<sup>13</sup> would have necessitated an FAA and behavior intervention plan (BIP). The evidence showed that Mother did not believe that the April 22, 2010 incident was serious, as she believed that the incident was "misunderstood", and that Student was not suicidal. Following the April 22, 2010 incident, Parents did not request an FAA.

87. Thus, the IEP team continued to believe that the instructional and behavioral approaches specified in Student's IEP, and as recommended in the then recently concluded mental health assessment, would or could be effective. The team revised Student's BSP on May 21, 2010, in response to the serious and "self-injurious" behavior incident of April 22, 2010, and changed Student's placement to a shortened modified school day schedule to reduce educational stress to Student. The self-injurious behavior exhibited by Student on April 22, 2010, was a new behavior, which had never

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<sup>13</sup> (Cal. Code Regs., tit. 5, § 3052, subd. (b).)

been known or assessed by District as a target behavior. Therefore, additional assessment of the self-injurious behavior was necessary after the April 22, 2010 incident. The IEP team changed Student's placement to an SDC class, which is a smaller, more structured academic setting, as recommended in the May 12, 2010 mental health assessment. As of the date of the May 17, 2010 IEP team meeting, Student's original BSP was in place and being implemented in his general education class and the resource room. Student was receiving services from the school counselor and was assigned a one-on-one aide for his behavior and academic needs. Student offered no evidence to show that the intervention in place at the time, and as further modified after the incident, was inadequate. Therefore, the evidence established that at the time of the development of the May 17, 2010 IEP, District had adequately and appropriately assessed Student. Student failed to meet his burden in establishing that his behavioral needs were not properly assessed by District and therefore it could not develop appropriate baselines, goals, and behavioral supports.

#### ISSUE NUMBER 5B – DENIAL OF INSTRUCTIONAL TIME

88. Regarding whether District denied Student instructional time in lieu of providing him appropriate behavioral support or assessments, the evidence failed to support this contention. This issue relates to the modified school day schedule, which Student was placed on after the April 22, 2010 mental health incident. Here, Student seems to allege that he was denied a FAPE, because District placed him on the modified school day schedule, rather than provide him appropriate behavioral support or assessments. The evidence failed to support this assertion.

89. The IEP team has an obligation to review and revise Student's IEP based on new information it obtained about Student's disability and needs. Student was placed in the modified school day schedule on April 26, 2010, shortly after the April 22, 2010 incident. Parents fully participated in the decision to place student in the modified

school day schedule, and consented to modified school day offer and the April 26, 2010 IEP addendum. The offer of a modified school day was made by the IEP team members in order to reduce school pressure on Student following the April 22, 2010 mental health incident, while the IEP team determined what to do to address his behavior moving forward. The modified school day offer was not made in lieu of providing Student appropriate behavioral support or assessments. In fact, at the time of the May 17, 2010 IEP team meeting, referrals had been made for additional assessments of Student, including a mental health assessment. Student's BSP was updated and Student was receiving behavior supports and services based on his IEP. As a result of his placement on a modified school day schedule, the IEP team, at the May 21, 2010 IEP, decided to provide Student with ESY services for the instructional time lost due to the shortened modified school day schedule. Thus, the evidence failed to establish that Student was denied instructional time in lieu of appropriate behavioral support or assessments.

90. As found above, Student's behavior needs continued to be appropriately assessed as of the May 17, 2010 IEP time meeting. Therefore, substantively or procedurally, Student failed to establish that he was denied instructional time.

#### ISSUE NUMBER 5C – FAILURE TO OFFER STUDENT OT SERVICES

91. Student contends that he was denied a FAPE because District failed to offer him OT services. While the evidence established that Student was not offered OT services at this IEP, as discussed below, Student's OT needs were discussed, and OT services were offered to Student at the May 21, 2010 IEP. Student failed to show how this very short and insignificant delay denied him a FAPE. Student has offered no persuasive evidence to establish that the May 21, 2010 review of the OT assessment results was untimely. Therefore, as neither a procedural nor a substantive violation was

established regarding the provision of OT services to Student on May 21, 2010, rather than on May 17, 2010, Student failed to meet his burden on this sub-issue.

#### MAY 21, 2010 IEP ADDENDUM<sup>14</sup>

92. This IEP Addendum team meeting was called to review the OT and mental health assessments, the BSP revision, and services for Student. This IEP was attended by Parents; Brad Bailey, Student and Parents' Educational Advocate; Carol Kenyon, District's Designee and Administrator at the IEP team meeting; Jeanne Buchannan, District's Occupational Therapist; Ms. Munoz; Michele Keil, Student's general education teacher at Kermit King; Stacy Halebsky, Student's special education teacher; Mr. Pridgeon; and Nancy Hulbert, School Psychologist and Special Education Coordinator for District.

93. Placement options for Student were discussed. Placement options considered and discussed included the following: an SDC placement at another school site (Bauer Speck) with behavior support; continuing at current school site (Kermit King) with support; Emotionally Disturbed SDC placement at another school site; and Home Hospital Instruction until another placement could be agreed to by the team. Assessment information available about Student did not show that Student was emotionally disturbed or that he qualified for special education services under that category. The team agreed that a structured class, more routine, lower staff-student ratio was ideal for Student, and thus, an SDC placement was offered to Student for the rest of the 2009-2010 SY. Parents would observe the SDC classes at Virginia Peterson Elementary School and Bauer Speck. Extended School Year (ESY) services were

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<sup>14</sup> The May 21, 2010 IEP is not in issue in the matter. However, as relevant to the issues that have been raised by Student, a discussion of the May 21, 2010 IEP is presented herein below.

discussed, and the team agreed to ESY services. Parents participated in the IEP, consented to the placement offer made and signed the IEP addendum.

94. The team discussed Student's mental health needs, and they decided to assign him a therapist. The team also recommended OT services for Student, 45 minutes per week for a total of 180 minutes per month. The team would make a referral to Fresno Diagnostic Center for additional assessment, and Student would continue his modified school day schedule until next IEP team meeting to be held on May 28, 2010.<sup>15</sup>

95. Student's rise in behaviors since spring break was discussed, and the October 26, 2009 BSP was reviewed and updated to address Student's rise in behaviors. The revised BSP dated May 21, 2010 (updated BSP) contained appropriate behavioral supports for Student, clarified the behavior interventions so that those interventions could be implemented more appropriately, and reflected Student's present behavior needs at the time it was developed. The updated BSP, dated May 21, 2010, included relevant information and description of Student's problem behaviors, environmental information and well as interventions to help address Student's behaviors.

96. As discussed earlier, Ms. Munoz established that the revision of the original BSP, and the need for the updated BSP dated May 21, 2010, was primarily necessitated by the need to ensure that District staff had an implementable plan to address Student's unsafe behaviors, and to provide more specific instructions regarding coping and self-soothing strategies for Student for ease of implementation by new staff members who may be working with Student. With this revision, any deficiency relating to the BSP dated October 26, 2010, and regarding the question of whether the coping and self-soothing strategies in the earlier BSP could be implemented appropriately was clarified.

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<sup>15</sup> Due to scheduling issue, that meeting was held on June 10, 2010.

## JUNE 10, 2010 IEP ADDENDUM

97. The purpose of the June 10, 2010 IEP Addendum team meeting was to add mental health goals and services to Student's IEP. The team discussed Student's SDC and related concerns. The team agreed to SDC primary placement at Bauer Speck. His classes for the SDC placement as well 2010 ESY services for Student were discussed. Student would receive transportation services and participate in a full-day school program for the 2010-2011 SY, beginning on August 30, 2010. His goals, services and BSP would continue to be implemented during the ESY and at his new placement at Bauer Speck during the 2010-2011 SY.<sup>16</sup> Parents participated in the IEP team meeting and consented to the IEP addendum. Otherwise, the specific issues that Student raised regarding the June 10, 2010 IEP addendum are discussed below.

### ISSUE NUMBER 6A – FAILURE TO HAVE A GENERAL EDUCATION TEACHER AT IEP TEAM MEETING

98. The evidence failed to establish that a general education teacher was a "required" member of the June 10, 2010 IEP team meeting. The stated primary purpose of the meeting was to add mental health goals and services to Student's IEP. Mental health goals were added. Student failed to offer any evidence to show that a general education teacher was required to develop the mental health goals, or that a placement

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<sup>16</sup> The evidence showed that Student attended Peterson Elementary School for his ESY services. Marilyn Richie, Student's teacher during the ESY and for the 2010-2011 SY, established that she received training from Ms. Munoz regarding the implementation of Student's BSP, and that she appropriately implemented the BSP during both the ESY and the regular SY. She was able to use the BSP-prescribed interventions to address Student's behavior in the classroom.



decision warranting the presence or participation of a general education teacher was made at the June 10, 2010 IEP team meeting .

99. The evidence established that while additional information was presented regarding Student's SDC placement at the June 10, 2010 IEP team meeting, the placement decision had already been made at the May 21, 2010 IEP team meeting. Parents and all other required members of Student's IEP team meeting , which included a general education teacher, had been present at the May 21, 2010 meeting. Therefore, the evidence established that a general education teacher was not required at the IEP team meeting of June 10, 2010.

#### ISSUE NUMBER 6B – ASSESSMENT OF BEHAVIOR NEEDS

100. As earlier discussed, as to the October 26, 2009 IEP, Student's contention that his behavioral needs were not properly assessed by District and therefore District could not have developed appropriate baselines, goals, and behavioral supports, was lacking credible proof. The evidence established that Student's behaviors had been appropriately assessed and reassessed based on the information about Student that was available at the time of each assessment. For example, at the time of the June 10, 2010 IEP team meeting, a mental health assessment of Student had been completed on May 12, 2010, following his April 22, 2010 incident, and his behavior escalations at the time.

101. District conducted an FBA on October 26, 2009, based on known behavior issues in Student at the time, including noncompliance or refusal to follow directions, and disruptive behaviors, among others. The evidence further showed that Student's teachers and other staff were assessing Student informally, by working with him regarding his behavior and observing him, monitoring his behavior and behavior goals, and by collecting data and reporting on Student's behavior regularly. Parents and teachers fully participated in these processes. Student's behavior had been appropriately assessed in the past – in 2006 and by the October 26, 2009 triennial psychoeducational

assessment. All known and suspected areas of Student's behavioral deficits were assessed. Based on the psychoeducational assessment, a BSP and counseling was recommended, and Student was referred for the mental health assessment and services.

102. Therefore, the evidence failed to support a finding that Student's behavioral needs were not properly assessed by District, as District assessed Student in all areas of known and suspected disability relating to his behavior. Based on the FBA, a BSP had been developed for Student. At the time of the June 10, 2010 IEP, Student's BSP was in place, and was being implemented. No issue has been raised regarding the implementation of this BSP. The existing BSP was not designed to address the April 22, 2010 "self-injurious" behavior of Student, as this behavior was a new behavior of Student when it occurred on April 22, 2010. Prior to April 22, 2010, self-injurious behavior had not been observed, earlier known or suspected by District. After the April 22, 2010 self-injurious behavior however, Student's BSP was revised, and his IEP updated to reflect assessment information and recommendations made by the mental health assessors regarding Student's mental health and educational needs. Student did not establish that the District needed to conduct an FAA, as Student presented no evidence to establish that the instructional and behavioral approaches specified in his IEP with the revised BSP have been, or would be ineffective contrary to what the IEP team members believed. The IEP team changed Student's placement to a shortened modified school day schedule to reduce education stress on Student. The IEP changed Student's placement to an SDC class, which is a smaller, more structured academic setting, as recommended in the mental health assessment of May 12, 2010.

103. Therefore, the evidence established that at the time of the development of the June 10, 2010 IEP, District had adequately and appropriately assessed Student. Student failed to establish that his behavioral needs were not properly assessed by District so that it could not develop appropriate baselines, goals, and behavioral

supports on the date of the June 10, 2010 IEP. Therefore, Student failed to meet his burden on this sub-issue.

#### ISSUE NUMBER 6C – LRE

104. Here, Student contends that District failed to offer him a placement in the LRE. Student contends that District's June 10, 2010 IEP offer of SDC placement at Bauer Speck was not the LRE, but Kermit King, with additional support and services including a one-to-one aide was the LRE.

105. A special education student must be educated with non-disabled peers to the maximum extent appropriate, and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The determination of whether a particular placement is the least restrictive environment for a student involves an analysis of four factors, including: 1) the educational benefits to the child of placement full-time in a regular class; 2) the non-academic benefits to the child of such placement; 3) the effect the disabled child will have on the teacher and children in the regular class; and 4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district's proposed setting.

106. The following analysis is presented in respect to the LRE requirements if Student was to be placed in a full-time regular education program at Kermit King with typical peers, having regard for the educational benefits to Student of placement in full-time a regular education class, the non-academic benefits to Student of such placement, the effect of such placement on teachers and peers, and the cost of educating Student. It is not disputed that the SDC placement at Bauer Speck is a more restrictive placement than Student's prior general education placement at Kermit King. At Bauer Speck, Student would receive 77 percent of his instruction outside the regular education class,

and be mainstreamed for 23 percent of his school day. At Kermit King, Student received regular education academic instruction 87 percent of his school day and specialized instructions outside of the regular education class for 13 percent of the time.

107. There is no dispute that Student made inconsistent educational progress at Kermit King and had behaviors that were impeding his learning. The behaviors were not consistently controlled. Student received most of his academic benefits from his participation in the resource program and instruction in a separate and self-contained academic setting in the resource room. Social benefits to Student were limited in the general education setting at Kermit King due to peer interaction issues, often resulting from his behaviors. Therefore, the evidence showed that Student's ability to make meaningful educational benefits at Kermit King's general education placement was questionable, as he received inconsistent academic and educational benefit in that placement, especially in the behavioral and social-emotional areas.

#### ACADEMIC BENEFITS

108. Regarding the first of the four factors for analysis of the LRE, while Student was in a general education placement at Kermit King, Student had a BSP and received services and supports for his academic and behavior needs. At various times while Student was at Kermit King, he was offered and assigned paraeducators (one-on-one aides) to assist him with his academic work and behavior needs. Such aides included Katherine McClure, Susan Sullivan, Susan Mallory and Stephanie Tarner, who were assigned to work with Student at different times. Rather than staying in the general education classroom, Student preferred going into the resource room and working with the resource teacher in a smaller, self-contained setting similar to the SDC class setting, and away from his peers. The evidence established that Student did more academic work in his preferred setting, the resource room, rather than in his general education classroom. Therefore, while the evidence showed that Student made academic progress

and his behaviors were initially controlled, the academic progress was mainly made in the resource room, and his behaviors had intensified and become more serious in his general education setting or classroom.

109. By contrast, based on the testimonies of both of Dr. Ball and Dr. Laura Ferguson,<sup>17</sup> as well as other witnesses including his teacher, Ms. Richie, at Student's current placement at Bauer Speck, he is making progress both academically and behaviorally. His behavior needs are better addressed, and his behaviors are being controlled with better results. Student is showing both academic and behavioral progress. While Student was at Kermit King's general education classroom, his academic progress was questionable in that general education setting, and his behavior was not fully controlled. He was engaging in unsafe behaviors, was non-compliant and disruptive in the classroom. Aides were having difficulty working with him at that setting.

#### NON-ACADEMIC BENEFITS

110. For the second of the four factors, Student made only limited social and behavioral progress in his general education placement at Kermit King, as his peer

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<sup>17</sup> Dr. Ferguson has both master's and doctorate degrees in clinical psychology, and a bachelor's degree in business administration. She has worked in the areas of psychiatry and psychology since around 1999, and has experience providing psychological consultations to schools, conducting crisis evaluations, and psychological and neuropsychological assessments in children and adults. Her area of specialization is pediatric diagnostic assessments. District and Parents contracted Dr. Ferguson to conduct an independent psychological and educational assessment of Student. Her "Confidential Diagnostic Assessment" IEE of Student was conducted between November 30, 2010 and January 5, 2011. She issued a report dated January 10, 2011.

relationships struggled and his behavior escalated. The evidence established that Student preferred adults and hardly spent time with his peers. Therefore, the evidence failed to establish that Student received any meaningful non-academic benefits in his general education placement at Kermit King.

111. The arguments that Student and some of the independent assessors, including Dr. Ferguson and Dr. Ball, have made is that Student could have made educational progress (academic and behavioral) in the general education setting, if certain supports and services had been offered. As found above, this contention is not supported by the evidence. This argument is at best speculative. During the relevant times, Student had a BSP in place to address his behavior, and received a number of supports and services including one-on-one aides. These interventions have not been shown to work with Student in addressing his escalating behavior. As Dr. Ball and Dr. Ferguson never observed or assessed Student while in the general education setting, it is unclear what the basis of their opinions that with additional supports and services in the general education setting Student could or would do better in that setting, were. Therefore, given Student's disability and needs, Student has presented no persuasive evidence in support of a proposition that Student continued to receive meaningful educational benefits in his general education placement at Kermit King before he was moved to the SDC class at Bauer Speck.

112. Also, Mother testified at the hearing that the behavior aides have not helped Student as she got the same numbers of calls regarding Student's behavior regardless of whether Student had an aide or not. Most of the witnesses, including Br. Ball, Dr. Laurie Ferguson, Karen Lutes – District's Speech and Language Pathologist,<sup>18</sup>

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<sup>18</sup> Ms. Lutes is a licensed speech and language pathologist. She has a bachelor's degree in communicative disorders and a master's degree in speech and language pathology. Ms. Lutes holds both California and national credentials/certificates as a

Paul Filkins,<sup>19</sup> Ms. Murphy, Ms. Munoz, Mr. Pridgeon, Ms. Buchanan, Ms. Kenyon,<sup>20</sup> Ms. Halebsky, Ms. Keil, Ms. Richie, and Ms. Gonzalez, agreed that Student was struggling in his general education classroom, and that his behavior was not addressed in that setting. Thus, the evidence failed to show that these one-on-one aides have had any immediate or long term effect in addressing Student's behavior in the general education setting. As established above, while Student had responded to the behavior interventions and supports that were included in his IEP and received in his prior general education placement at Kermit King, the response has been inconsistent. At intervals, his behaviors have responded to intervention without any predictability. Student had an

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speech pathologist, and teaching credential in Clinical Rehabilitative Services (Language, Speech and Hearing) since 1993. She has experience conducting assessments and services special needs students with speech and/or language needs. She conducted a speech and language assessment of Student on February 4, 2010, and the assessment's results were reviewed and discussed by Student's IEP team on March 11, 2010.

<sup>19</sup> Mr. Filkins has a master's degree in occupational therapy, and a bachelor's degree in psychology. He holds a California Board of Occupational Therapy license and a national occupational therapy certificate. He currently works as an occupational therapist with the Ventura Unified School District. He has experience conducting assessments and servicing special needs students. Mr. Filkins was contracted by the parties to conduct an independent OT assessment of Student, which was done on January 3, 2011. His assessment report was reviewed and discussed at March 11, 2011 IEP team meeting .

<sup>20</sup> Ms. Kenyon was the School Principal at Kermit King during some of the time Student was placed there, and from August 2009 and June 2010.

unanticipated mental health crisis on April 22, 2010, leading to the consequent change in his educational placement.

#### DISRUPTION AND COST

113. Regarding the third factor relating to the effect Student had on the teacher and other students, very limited evidence was presented on this issue. However, based on the overall evidence in this hearing, and the documented behaviors of Student, Student was non-compliant and disruptive in his general education placement.<sup>21</sup> He was reported not to follow instructions, and had difficulty working with adults and other students in the classroom, among others difficulties. Based on the totality of the evidence, Student had negative effects on his peers, teachers and aides in the general education classroom at Kermit King.

114. Lastly, regarding the fourth factor in the LRE analysis, none of the parties presented any evidence on cost, and no finding is made on this factor.

115. When compared to Kermit King, especially based on the LRE analysis, District established that Student's needs could be appropriately met in the SDC classroom at Bauer Speck with a lower adult-to-student ratio, individualized instruction, additional one-on-one support due to the lower adult-to-student ratio, less transition, and simplified and specialized curriculum. He would receive additional accommodations and modifications due to the structure of the SDC, which was more individualized unlike

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<sup>21</sup> Student once accidentally cut a teacher with a scissors because he was refusing to follow the teacher's instruction to hand the scissors back to her. Student was reported to hand over the scissors back to the teacher, but with open blades that cut the teacher's hand. The evidence failed to show that "the cutting" was an intentional act Student.



in a general education setting. Behavior would be better monitored and addressed in the class because the class is much smaller more structured with fewer transitions. At the time of the June 10, 2010 IEP, Student failed to establish that Kermit King was appropriate for him, or that he continued to make meaningful educational progress, that he could or would have received meaningful educational benefit in a lesser restrictive setting than Bauer Speck. The evidence failed to show that additional support and services would have made the general education placement at Kermit King appropriate for Student.

116. Student was overwhelmed by academic pressures in the general education setting and thus made little or diminishing progress. The evidence showed that Student would receive meaningful educational benefit in the SDC placement. Therefore, the evidence established that the SDC program at Bauer Speck was the least restrictive placement for Student given his disability and needs, where he could receive meaningful educational benefit.

#### OCTOBER 18, 2010 ANNUAL IEP (2010-2011 SY)

117. The October 18, 2010 IEP team continued to determine Student eligible for special education services under the category of Specific Learning Disability. According to the IEP, Student's areas of need included reading, writing, fine motor development (OT), social-emotional and behavior (peer avoidance), work completion, and need for reading glasses. Regarding his specific behaviors, as contained in the October 18, 2010 IEP, Student was reported to appropriately raise his hand before talking, join in classroom discussion, but avoided large groups of students. He preferred to spend his recess and lunch in the classroom with his teacher, and was quiet around other students and communicated little with others. No negative interaction was observed between Student and peers. His behavior continued to impede his learning.

118. Regarding the placement decision, the team considered regular education, regular education with accommodations, SDC placement, related services and resource and learning center services. Student was placed in the second grade SDC class at Bauer Speck, and was to receive special education services and supports. Student would receive 1430 minutes of specialized academic instruction per week, 180 minutes per month of OT services, 30 minutes per month of individual mental health (Parent counseling and Family therapy) services, 30 minutes monthly of individual social work services, 60 minutes per month (or more if needed) of individual specialized physical health care services, and 60 minutes per month of individual counseling. He would receive ESY services. At this SDC placement, Student would receive 77 percent of his instruction outside the regular education class and would be mainstreamed for 23 percent of his school day.

119. All required IEP team members including, Parents and a representative from County Mental Health agency, were present at the IEP team meeting of October 18, 2010. Student's needs, goals, school schedules, support and services were discussed. The evidence established that Parents were able to fully participate in the IEP team meeting of October 18, 2010. Parents wanted the IEP documents to be sent home so they could review with their advocate. Parents have not consented to this IEP.

#### ISSUE NUMBER 7 (A) AND 7(B) – GOALS

120. As relevant to the issues in this matter, the IEP of October 18, 2010 contained the following goals:

Goal Number 5 (improve word attack skill). "By 10/18/11, when given individual letters, letter patterns containing consonant blends, and letter patterns containing long and short vowel patterns in random order, [Student] will orally

combine these elements to create recognizable words with 80% accuracy in 4 of 5 trials as measured by teacher-charted observations." The baseline information included with this goal provided that "When given up to three sounds, [Student] can blend the sounds orally into words or syllables with 80% accuracy in 3 consecutive trials as measured by teacher-charted observations." This goal contained short-term objectives to be accomplished progressively by March 2011 and June 2011, prior to the October 17, 2011 target date for the goal. Student contends that the baseline "cannot be measured as they relate to the goals." Student argues that it impossible to tell whether he already met the goal.

Goal Number 6 (behavior-independence). "By 10/18/11, When given a one to two step direction during his Language Arts instruction to complete a task such as read, write, or provide a verbal response (such as blending sounds, etc.), [Student] will initiate the task within 10 seconds and require no more than 1 verbal prompt in 3 consecutive trials as measured by direct observation by support staff." The baseline statement included with the goal provided that "[Student] has 90 minutes of instruction in Language Arts in the am using "Open Court" and an additional 30 minutes of instruction using the Early Reading Intervention program. He was much more compliant in the morning activities that don't require written language. Now that the experience is not so 'new', he is beginning to show resistance to the

written language activities and the oral/written requests made in the afternoon. A schedule that breaks up this instruction time is now obviously needed and will be developed within days of this IEP." The goal contained short-term objectives to be accomplished progressively by March 2011 and June 2011, prior to the October 17, 2011 target date for the goal. Student contends that the baseline "cannot be measured as they relate to the goals."

Mental Health Goal Number 1. "[Student] will display improvement in appropriate interactions to avoid conflict with teachers and peers. [Student] will display improved behaviors in class and with peers to reduce referrals/time-out/suspension. [Student] will obtain 80% of [good behavior] points over two consecutive months as measured by data collection." The baseline statement provided stated that "[Student] presents with inattentiveness, impulsivity, poor peer relations, low frustration tolerance, and is easily distracted." It further provided that: "In a small classroom setting of 14 students [Student] has not needed to leave the classroom, be suspended, nor sent to time out, etc. He does become more agitated in larger groups that demand more concentration, written language and last 90 minutes." Student contends that the baseline was "not measurable as they relate to the goals."

Mental Health Goal Number 2. "1) Client and family will be able to accurately express symptom configuration with medical staff. 2) Client and family will attend [appointments] and comply with medication regimen, if needed 3) Teacher and mother will report an overall reduction in intensity and frequency of prevailing symptoms for four consecutive weeks." The baseline statement provided stated that "[Student] presents with inattentiveness, impulsivity, poor peer relations, low frustration tolerance, and is easily distracted." Student contends that the baseline was "not measurable as they relate to the goals," or that the baseline did not relate to the corresponding goal.

#### ISSUE NUMBER 7(A) – GOALS

121. Regarding Goal Number 5, as discussed earlier, the law does not require that a PLOP or baseline be measurable. Rather, the law requires goals to be based on accurate PLOP, to address unique needs of Student, and for the goal to be measurable. Therefore, Student's issue relating Goal Number 5 in the October 18, 2010 IEP fails.<sup>22</sup>

122. Regarding Goal Number 6, because the law does not require that PLOP or baseline be measurable, Student's issue relating to Goal Number 6 in the October 18, 2010 IEP fails on that ground. While the PLOP information is required to be obtained by

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<sup>22</sup> While an argument could be made here, regarding whether the baseline information was accurate because "it was impossible to tell whether Student already met the goal," the issue of "accuracy of the PLOP" information is not presented for determination.

the IEP team prior in developing an IEP offer, there is no requirement that the PLOP information must be contained on those specific pages of the IEP document where Student's goals were presented. The evidence established that the October 18, 2010 IEP contained additional information regarding Student's PLOP (pages two and three of the IEP document), other than what was stated or included with the goals on the goals pages of the IEP. Regarding his behavior contained in the PLOP pages of the IEP, it was said that Student was remembering to raise his hand, liked to join in the classroom discussion, avoided large groups of children, and preferred at this time to spend recess and lunch time in the classroom with the teacher. He would complete his math work, but not written language.

123. Regarding Goal Number 6, Student failed to establish that the baseline statements did not accurately reflect Student's levels of academic achievement and functional performance at the time they were written. At the time the IEP was developed, the evidence supports a finding that Student continued to be dependent on preferred adults, was avoidant of tasks, and was still experiencing behavior issues relating to compliance. Goal Number 6 was meant to address these issues. Therefore, the evidence established that Student's Goal Number 6 and the short-term objectives, as contained in the October 18, 2010 IEP, were based upon baseline information gathered through assessment information, teacher's observation, documentation and reporting regarding Student's behavioral needs and need for independence. The information reflected accurate information regarding Student's levels of academic achievement and functional performance at the time it was developed, and were useful and adequate in developing measurable goals for Student at the relevant time. District would monitor and measure Student progress towards the goal. Therefore, Student failed to meet his burden on this sub-issue.

## ISSUE NUMBER 7B – MENTAL HEALTH GOALS

124. Regarding the Mental Health Goal Numbers 1 and 2, Student contends that the baselines relating to the goals were not measurable. As discussed earlier, the law does not require that a PLOP or baseline be measurable. The evidence established that prior to the development of Student's mental health goals, a mental health assessment of Student was conducted, which gave District's staff and the mental health representative accurate information about Student's PLOP relating to mental health. Based on that assessment, and other information available about Student, it was reported that Student had not needed to leave the classroom in his small classroom setting, had not been suspended or sent to time-out. He did become more agitated in larger groups that demanded more concentration. Based on the assessment and data collection, the PLOP information showed that "Student presents with inattentiveness, impulsivity, poor peer relations, low frustration tolerance, and is easily distracted," among others. Therefore, the evidence failed to establish that the baseline statements or PLOP did not accurately reflect Student's levels of academic achievement and functional performance.

125. Regarding Mental Health Goal Number 2, it is unclear who or what the goal was written for, whether Student, Parents, school staff or others. However, the issue of the appropriateness, clarity or implementation of the goal is not presented for determination in this case, and no persuasive evidence has been offered by Student thereto. Otherwise, as discussed before, the evidence established that prior to the development of Student's mental health goals, a mental health assessment of Student was conducted, which gave District's staff and the mental health representative accurate information about Student's PLOP relating to his mental health. Based on the assessment and data collection, the PLOP information showed that Student showed inattentiveness, impulsivity, poor peer relations, low frustration tolerance, and was easily

distracted, among others. Therefore, the evidence failed to establish that the baseline statements or PLOP did not accurately reflect Student's levels of academic achievement and functional performance at the time they were written. Therefore, Student failed to meet his burden on this sub-issue.

#### ISSUE NUMBER 7C – ASSESSMENT OF BEHAVIOR NEEDS

126. As discussed previously, at the time the October 18, 2010 IEP was developed, Student's contention that the District had not properly assessed his behavioral needs and therefore it could not have developed appropriate baselines, goals, and behavioral supports, is not supported. To the contrary, the evidence established that District assessed Student in all areas of known and suspected disability relating to his behavior at the time of the October 18, 2010 IEP. District conducted a timely and complete FBA in October 2009, and made a referral for a mental health assessment and services of Student after his mental health crisis. The District modified Student's BSP after the April 22, 2010 incident after completing further assessments, including a mental health assessment. At the time of the October 18, 2010 IEP, Student's BSP was in place and being implemented. No issue was raised regarding the implementation of the BSP in this matter. The October 18, 2010 IEP contained appropriate behavior goals to address Student's behaviors and included mental health goals and services.

127. The evidence established that at the time of the October 18, 2010 IEP, District had adequately and appropriately assessed Student. It had accurate baseline statement or PLOP information about Student's performance and behavior, and the PLOP was sufficient to support the development of measurable behavior goals and objectives for Student. Thus, Student failed to establish that his behavioral needs were not properly assessed by District so that it could not develop appropriate baselines, goals, and behavioral supports on the date of the October 18, 2010 IEP. Therefore,



Student failed to meet his burden on this sub-issue as the evidence did not support a finding that his behavioral needs were not properly assessed by District.

#### ISSUE NUMBER 7D – LRE

128. Student contends that District failed to offer him a placement in the LRE. This contention is not supported by the evidence. Regarding the LRE requirements as discussed above, again here, it is not disputed that the SDC placement at Bauer Speck is a more restrictive placement than Student's prior general education placement at Kermit King. However, as discussed before, Student failed to offer any evidence to show that he continued to receive meaningful educational benefits in his general education placement at Kermit King before he was moved to the SDC class in Bauer Speck. To the contrary, Student is making meaningful academic and behavioral progress at his current placement. His behavior needs are better addressed, and his behaviors are being controlled with better results. Student received limited educational benefits at Kermit King due to his uncontrolled behavior and the higher academic pressures. The evidence failed to establish that Student received any meaningful non-academic benefits in his general education placement, and Student had negative effects on his peers, teachers and aides in the general education classroom at Kermit King.

129. Therefore, when compared to Kermit King, District established that Student's needs could be met in the SDC classroom at Bauer Speck because of lower adult-to-student ratio, individualized instruction, additional individualized attention due to the lower adult-to-student ratio, and specialized curriculum. He would receive additional accommodations and modifications due to the structure of the SDC, which was more individualized than a general education setting. Behavior would be better monitored and addressed in the SDC because it is much smaller, more structured and has fewer transitions. District established that Student received meaningful educational benefits at the SDC placement at Bauer Speck. At the time the October 18, 2010 IEP was

developed, Student failed to establish that Kermit King continued to be appropriate for him, or that he would have continued to make meaningful educational progress in the general education placement at Kermit King. Thus, the evidence failed to establish that Student could or would have received meaningful educational benefits in a less restrictive setting than Bauer Speck. The evidence failed to show that additional support and services would have made the general education placement at Kermit King appropriate for Student at the time the IEP was developed, and after his mental health crisis of April 22, 2010.

130. Therefore, the evidence established that, rather than in a general education classroom, Student's academic, social and behavior, as well as safety issues could be and were addressed in the SDC placement due to more structure, less transition, a simplified curriculum, lower adult-to-student ratio, additional supports, services, curriculum modifications and accommodations. Student was overwhelmed by academic pressures in the general education setting and thus made little and diminishing progress. The evidence showed that Student received meaningful educational benefit in the SDC placement. Therefore, the evidence established that Student's placement in the SDC class at Bauer Speck pursuant to the October 18, 2010 IEP was the least restrictive placement for Student given his disability and needs, where he could receive meaningful educational benefit.

## LEGAL CONCLUSIONS

### APPLICABLE LAW

#### Burden of Proof

1. The Student, as the petitioning party seeking relief, has the burden of proof. (*Schaeffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. A request for a due process hearing “shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request.” (Ed. Code, § 56505, sub. (I).) This time limitation does not apply to a parent if the parent was prevented from requesting the due process hearing due to either: 1) Specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or 2) The withholding of information by the local educational agency from the parent that was required to be provided to the parent under special education law. (*Ibid.*, see 20 U.S.C. § 1415(f)(3)(D).) Common law or equitable exceptions to the statute of limitations do not apply to Individuals with Disabilities Education Act (IDEA) cases. (*P.P. ex rel. Michael P. v. West Chester Area School Dist.* (E.D. Pa. 2008) 557 F.Supp.2d 648, 661, 662.) A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate. (*M.D. v. Southington Board of Ed.* (2d Cir. 2003) 334 F.3d 217, 221.) In other words, the statute of limitations begins to run when a party is aware of the facts that would support a legal claim, not when a party learns that it has a legal claim. (See *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039.)

3. Here, Student did not allege that the time was tolled, or that either exception to the statute of limitations applies. There was no evidence that the District ever made specific misrepresentations to parents that it had solved the problem forming the basis of the due process hearing complaint. Further, Student presented no evidence showing that District withheld information from Parents that should have been provided under the IDEA, i.e., a notice of procedural safeguards, Student failed to demonstrate that the exception applied. Student failed to demonstrate that an exception to the statute of limitations applied to this matter. Therefore, Student’s claims prior to February 1, 2009, are barred by the statute of limitations. (Factual Findings 6, 7,

13 and 16; Legal Conclusions 2 and 3) Because Student's claims are time-barred, this decision does not address the merits of Student's procedural claims based on the development of the September 24, 2008 IEP, or whether he was denied a FAPE prior to February 1, 2009.

#### Elements of a FAPE

4. Under both the IDEA and State law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400; Ed. Code, § 56000.) The term "free appropriate public education" means special education and related services that are available to the student at no charge to the parent or guardian, that meet the state educational standards, and that conform to the student's individualized education program. (20 U.S.C. § 1401(9).) California's definition of special education includes both specially designed instruction to meet the unique needs of individuals with exceptional needs and related services to enable them to benefit from such specially designed instruction. (Ed. Code, § 56031). Related services may be referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).) The term "related services," includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from the special education. (Ed. Code, § 56363, subd. (a); 20 U.S.C. § 1401(26).)

5. To provide a student with a FAPE, the district must determine his unique needs and design an IEP to meet those needs. Districts are not required to maximize a child's potential. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley*, *supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to

provide educational benefit to the student. (Id. at p. 201; J.L. v. Mercer Island School Dist. (9th Cir. 2010) 592 F.3d 938, 950-953.) The Ninth Circuit has also referred to the educational benefit standard as “meaningful educational benefit.” (N.B. v. Hellgate Elementary School Dist. (9th Cir. 2007) 541 F.3d 1202, 1212-1213; Adams v. State of Oregon (9th Cir. 1999) 195 F.2d 1141, 1149. (Adams).)

### IEP Requirements

6. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA. The IEP must include an assortment of information, including a statement of the child’s present levels of academic achievement and functional performance. The IEP must also include a statement of measurable annual goals and objectives that are based upon the child’s present levels of academic achievement and functional performance and a description of how the child’s progress toward meeting the annual goals will be measured. The IEP must include when periodic reports of the child’s progress will be issued to the parent, and a statement of the special education and related services to be provided to the child. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.346, 300.347 (2006).<sup>23</sup>)

There are two parts to the legal analysis of a school district’s compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (Rowley, *supra*, at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child’s unique needs, and was reasonably calculated to enable the child to receive educational benefit. (Ibid.) An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (JG v. Douglas

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<sup>23</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

County School Dist. (9th Cir. 2008) 552 F.3d 786, 801; Adams, supra, at pp 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (Id. at p. 1149, citing Fuhrmann v. East Hanover Bd. of Education (3d Cir. 1993) 993 F.2d 1031, 1041.) An IEP must be evaluated in terms of what was objectively reasonable when it was developed. (Ibid.)

In Rowley, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (Rowley, supra, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of a FAPE only if it impedes the child’s right to a FAPE, significantly impedes the parents’ opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, W.G. v. Board of Trustees of Target Range School Dist. No. 23 (9th Cir. 1992) 960 F.2d 1479, 1484.) That rule applies to flaws in an assessment. (Park v. Anaheim Union High School Dist. (9th Cir. 2006) 464 F.3d 1025, 1033, fn. 3; San Ramon Valley Unified School Dist. v. Student (2009) Cal.Offc.Admin.Hrngs. Case No. 2009061134; Capistrano Unified School Dist. v. Student (2006)(amended decision) Cal.Offc.Admin.Hrngs. Case No. N2005090873.)

## Assessment of Student’s Behavior Need

### ASSESSMENT REQUIREMENTS

9. To meet the continuing duty to develop and maintain an appropriate IEP, the school district must assess or reassesses the educational needs of the disabled child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) The school district must conduct a reassessment of the special education student not more frequently than once a year, but at least once every three years. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) The district must conduct a reassessment if the district “determines that the educational or related service needs, including improved academic achievement and functional

performance, of the child warrant a reevaluation.” (20 U.S.C. § 1414(a)(2)(A)(i); see also Ed. Code, § 56381, subd. (a).)

#### Assess in All Areas of Suspected Disability

10. The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (Ed. Code, § 56320, subds. (e), (f); 20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b).) School districts must perform assessments and reassessments according to strict statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor. The district must select and administer assessment materials that appear in the student’s native language and that are free of racial, cultural and sexual discrimination. (20 U.S.C. § 1414(b)((3)(A)(i); 34 C.F.R. § 300.304(c)(1)(ii); Ed. Code, § 56320, subd. (a).) The threshold for suspecting that a child has a disability is relatively low. (*Dept. of Educ. v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d. 1190, 1195.) A LEA’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

11. Trained, knowledgeable and competent district personnel must administer special education assessments. (20 U.S.C. § 1414(b)(3)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.) A credentialed school psychologist must administer psychological assessments and individually administered tests of intellectual or emotional functioning. (Ed. Code, §§ 56320, subd. (b)(3), 56324, subd. (a).) The district must administer assessment materials that are valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) The district must administer assessment materials that are sufficiently comprehensive and tailored to evaluate specific areas of educational needs. (20 U.S.C. § 1414(b)(3)(C); 34 C.F.R. § 300.304(c)(6); Ed. Code, § 56320, subd. (c).)

## Behavior Needs

12. In 1990, California passed Education Code section 56520, et seq., which is commonly known as the Hughes Bill, concerning behavioral interventions for pupils with serious behavior problems. Regulations implementing the Hughes Bill require that an LEA conduct an FAA, resulting in a BIP, when a student develops a "serious behavior problem," and the IEP team finds that the instructional or behavioral approaches specified in the student's IEP have been ineffective. (Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052, subd. (b).) A behavior intervention plan is required when a student exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the student's IEP. (Cal. Code Regs., tit. 5, § 3001, subd. (f).) A serious behavior problem means the individual's behaviors are self-injurious, assaultive, or the cause of serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional or behavioral approaches specified in the pupil's IEP are found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (aa).) Federal law does not impose any specific requirements for a functional behavior assessment or behavior intervention plan. (*Alex R. v. Forrestville Valley Comty. Unit Sch. Dist.* (7th Cir. 2004) 375 F.3d 603, 615.) A functional analysis assessment must be conducted and considered in the development of a behavior intervention plan. (Cal. Code Regs., tit. 5, §§ 3001, subd. (f)(1), 3052, subd. (c).) The requirements for a behavior intervention plan and a functional analysis assessment are specific and extensive. (Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052.) California Code of Regulations section 3052, subdivision (b) sets forth the FAA requirements and the contents of the FAA report.

13. A BIP is "a written document which is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP." (Cal. Code Regs., tit. 5, §§ 3052, subd.



(a)(3), 3001, subd. (h).) A BIP shall be based upon an FAA, and therefore an FAA must first be conducted. (Cal. Code Regs., tit. 5, § 3052, subds. (a)(3) and (b)(1).)

14. There are many behaviors that will impede a child's learning or that of others that do not meet the requirements for a serious behavior problem requiring a behavior intervention plan. These less serious behaviors require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i), (b); Ed. Code, § 56341.1, subd. (b)(1).) If a student's behavior impedes learning, but does not constitute a serious behavior problem, the IEP team must consider behavior interventions as defined by California law. As noted by the comments to the 2006 federal implementing regulations, "[D]ecisions [as to the interventions, supports, and strategies to be implemented] should be made on an individual basis by the child's IEP team." (64 Fed.Reg. 12620 (2006).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (Park v. Anaheim Union High Sch. Dist. (9th Cir. 2005) 464 F.3d 1025; Neosho R V Sch. Dist., v. Clark (8th Cir. 2003) 315 F.3d 1022, 1028; Escambia County Bd. of Educ. V. Benton (S.D. Ala. 2005) 406 F.Supp.2d 1248.)

#### Determination of Issues

Sub-Issue 1(d): During the 2008-2009 SY, did District fail to provide Student with a FAPE because it failed to develop an appropriate IEP on September 24, 2008, because Student's behavioral needs were not properly assessed by District so it could not develop appropriate baselines, goals, and behavioral supports?

Sub-Issue 2(b): During the 2009-2010 SY, did District fail to provide Student with a FAPE because it failed to develop an appropriate IEP on September 16, 2009, because Student's behavioral needs were not properly assessed by District so that it could not develop appropriate baselines, goals, and behavioral supports?

Sub-Issue 3(g): During the 2009-2010 SY, did District fail to provide Student with a FAPE because it failed to develop an appropriate IEP on October 26, 2009, because Student's behavioral needs were not properly assessed by District and therefore it could not develop appropriate baselines, goals, and behavioral supports?

Issue 4: During the 2009-2010 SY, did District fail to provide Student with a FAPE because it failed to develop an appropriate IEP on March 11, 2010, because Student's behavioral needs were not properly assessed by District and therefore it could not develop appropriate baselines, goals, and behavioral supports?

Sub-Issue 5(a): During the 2009-2010 SY, did District fail to provide Student with a FAPE because it failed to develop an appropriate IEP on May 17, 2010, because Student's behavioral needs were not properly assessed by District and therefore it could not develop appropriate baselines, goals, and behavioral supports?

Sub-Issue 6(b): During the 2009-2010 SY, did District fail to provide Student with a FAPE because it failed to develop an appropriate IEP on June 10, 2010, because Student's behavioral needs were not properly assessed by District and therefore it could not develop appropriate baselines, goals, and behavioral supports?

Sub-Issue 7c: During the 2010-2011 SY, did District fail to provide Student with a FAPE because it failed to develop an appropriate IEP on October 18, 2010, because Student's behavioral needs were not properly assessed by District and therefore it could not develop appropriate baselines, goals, and behavioral supports?

15. Pursuant to Factual Findings 13, and Legal Conclusions 2 and 3, because of the statute of limitation, any issue relating to the development of the IEP, including the question of whether District had appropriately assessed Student's behavioral needs prior to the development of its September 24, 2008 IEP is time-barred. Thus, any matter

relating to whether Student's behavioral needs were properly assessed by District at or prior to the time the September 24, 2008 IEP was developed, including Issue One, sub-issue (d), is not determined herein.

16. Pursuant to Factual Findings 14 and 15, and Legal Conclusions 9 through 14, the evidence established that during the 2008-2009 SY, Student had adequate and appropriate goals, and behavioral supports, including the Individual Behavioral Chart that was being utilized for Student. The Individual Behavioral Chart and the low level behavior interventions that District was utilizing at the relevant time to monitor and address Student's known behavior at the time was adequate and appropriate. Student failed to establish that his behavioral needs had not been properly assessed by District so that it could not develop appropriate baselines, goals, and behavioral supports during the 2008-2009 SY. Therefore, Student failed to meet his burden on Issue One, sub-issue (d). As a result, a denial of FAPE is not found.

17. Pursuant to Factual Findings 31 and 35, and Legal Conclusions 9 through 14, as discussed above, Student also failed here to establish that his behavioral needs were not properly assessed by District so the District could not develop appropriate baselines, goals, and behavioral supports during the 2009-2010 SY. At the time of the September 16, 2009 IEP team meeting, District had appropriately assessed Student's behavioral needs based on the November 17, 2006 Preschool Early Intervention Assessment. At the relevant period, the early intervention assessment was less than three-years old, and additional behavior assessment was not legally required, unless Parents requested or Student's behavioral issue required one. At the time of the September 16, 2009 IEP team meeting, Parents had requested a behavioral assessment of Student, and an FBA assessment was pending completion. The evidence failed to establish that an FAA, rather than an FBA assessment was required of Student based on Student's reported behaviors prior to, and at the time of the September 16, 2009 IEP

team meeting. Also, at the September 16, 2009 IEP team meeting, additional behavioral assessments of Student was pending. At the time of this IEP team meeting, District had accurate baseline statement or PLOP information about Student, and the PLOP was reflective of Student's performance level in behavior. The PLOP was sufficient to support the development of measurable behavior goals and objectives for Student. Based on the information District had at the time, District was able to develop appropriate baselines, goals, and behavioral supports, for Student. The Individual Behavioral Chart and other behavior interventions (prompting, re-direction, among others) that District was utilizing at the relevant time to monitor and address Student's known behavior at the time was adequate and appropriate. Therefore, Student failed to establish that his behavioral needs were not properly assessed by District so that it could not develop appropriate baselines, goals, and behavioral supports prior to, and at the time of the September 16, 2009 IEP team meeting. Therefore, Student failed to meet his burden on Issue Two, sub-issue (b). As a result, a denial of FAPE is not found.

18. Pursuant to Factual Findings 69 through 77, and Legal Conclusions 9 through 14, as discussed above, Student failed to establish that his behavioral needs were not properly assessed by District so the District could not develop appropriate baselines, goals, and behavioral supports during the 2009-2010 SY. At the time of the October 26, 2009 IEP team meeting, District had appropriately assessed Student's behavioral needs based on the FBA dated October 26, 2009 and an earlier assessment in 2006. At the time of this IEP team meeting, District had accurate PLOP information about Student, and the PLOP was reflective of Student's performance level in behavior. The PLOP was sufficient to support the development of measurable behavior goals and objectives for Student. The evidence showed that District was able to develop appropriate baselines, goals, and behavioral supports, for Student. Based on Student's behaviors reported prior to, and at the time of the October 26, 2009 IEP team meeting,

the FBA and a BSP dated October 26, 2009, had been developed to address, monitor and report on Student's progress towards his behavioral goals. The BSP was adequate and appropriate to address known behavior issues in Student. At the October 26, 2009 IEP team meeting, the evidence failed to establish a need for additional behavioral assessments. Therefore, Student failed to establish that his behavioral needs were not properly assessed by District so that it could not develop appropriate baselines, goals, and behavioral supports. Thus, based on the totality of the evidence, Student failed to meet his burden on Issue Three, sub-issue (g). As a result, a denial of FAPE is not found.

19. Pursuant to Factual Findings 79 and 80, and Legal Conclusions 9 through 14, as discussed above, as established above, Student failed to establish that his behavioral needs were not properly assessed by District so the District could not develop appropriate baselines, goals, and behavioral supports during the 2009-2010 SY and at the time of the March 11, 2010 IEP team meeting. At the relevant time, as discussed above, District had appropriately assessed Student's behavioral needs and District was able to develop appropriate baselines, goals, and behavioral supports, for Student. District had accurate baseline statements or PLOP information about Student, and the PLOP was reflective of Student's performance level in behavior. The PLOP was sufficient to support the development of measurable behavior goals and objectives for Student. Based on Student's reported behaviors prior to, and at the time of the March 11, 2010 IEP team meeting, the FBA was adequate and appropriate to address known behavior issues in Student. At the March 11, 2010 IEP team meeting, a need for additional behavioral assessments was not established. The BSP dated October 26, 2009, was being appropriately implemented and Student's behaviors were being addressed through the interventions contained in the BSP. His progresses towards his behavioral goals were being monitored and reported upon regularly and periodically. Therefore, Student failed to establish that his behavioral needs were not properly assessed by

District so that it could not develop appropriate baselines, goals, and behavioral supports. Therefore, Student failed to meet his burden on Issue Four. As a result, a denial of FAPE is not found.

20. Pursuant to Factual Findings 86 and 87, and Legal Conclusions 9 through 14, as established above, Student failed to establish that his behavioral needs were not properly assessed by District so the District could not develop appropriate baselines, goals, and behavioral supports during the 2009-2010 SY or at the time of the May 17, 2010 IEP team meeting. While the evidence established that prior to this IEP team meeting, Student had a mental health crisis on April 22, 2010, wherein he put a pair of scissors on his throat, District responded appropriately by referring Student for a mental health assessment that was completed May 12, 2010, by the San Luis Obispo County Health Agency. As part of this assessment, Student's IEPs, prior assessments reports and BSP, medical and psychiatric histories, among others, were reviewed. Mother believed the April 22, 2010 incident was "misunderstood" and that Student was not suicidal. The evidence failed to establish that Parents requested additional assessment, or that additional assessment was warranted due to the April 22, 2010 incident. In response to the incident of April 22, 2010, the IEP team recommended a revision of Student's BSP, and changed Student's placement to a shortened modified school day schedule in order to reduce educational stress to Student.

21. The evidence established that as of the May 17, 2010 IEP team meeting, Student's behavior had been adequately and appropriately assessed by District. Prior to, and at this relevant time, District had assessed Student in all areas of known and suspected disability relating to his behavior. District was able to develop appropriate baselines, goals, and behavioral supports, for Student. At the time of this IEP team meeting, District had accurate baseline statements or PLOP information about Student, and the PLOP was reflective of Student's performance level in behavior. The PLOP was

sufficient to support the development of measurable behavior goals and objectives for Student. His mental health assessment was pending completion. Based on Student's behaviors reported prior to, and at the time of the May 17, 2010 IEP team meeting, the prior FBA and the ongoing mental health assessments were adequate and appropriate to investigate and address known behavior issues in Student. Based on the prior FBA, a BSP had been developed for Student and was being revised at the time of the May 17, 2010 IEP team meeting. The BSP revision was completed on May 21, 2010. On May 17, 2010, the original BSP was being implemented. The evidence showed that the IEP team continued to believe, and thus determined that the instructional or behavioral approaches specified in Student's IEP would continue to be effective with the ongoing revision. The evidence failed to establish that the District needed to conduct an FAA after the April 22, 2010 incident. Student failed to establish that his behavioral needs were not properly assessed by District so that it could not develop appropriate baselines, goals, and behavioral supports. Based on the totality of the evidence, Student failed to meet his burden on Issue Five, sub-issue (a). As a result, a denial of FAPE is not found.

22. Pursuant to Factual Findings 100 through 103, and Legal Conclusions 9 through 14, as established above, Student failed to establish that his behavioral needs were not properly assessed by District so the District could not develop appropriate baselines, goals and behavioral supports during the 2009-2010 SY or at the time of the June 10, 2010 IEP team meeting. As found above, following Student's mental health crisis on April 22, 2010, District referred Student for a mental health assessment that was completed May 12, 2010. At that relevant time, District had appropriately assessed Student's behavioral needs based on the FBA and the BSP dated October 26, 2009, and the mental health assessment dated May 12, 2010.

23. The evidence showed that District had assessed Student in all areas of known and suspected disability relating to his behavior at the relevant time. According to the FBA, a BSP had been developed for Student and had been revised at the time of the June 10, 2010 IEP team meeting. The BSP was being implemented at the relevant time. As found above, the evidence showed that the IEP team continued to believe, and thus determined that the instructional or behavioral approaches specified in the student's IEP would continue to be effective. The IEP team had also changed Student's placement to a shortened modified school day schedule to reduce education stress to Student. The evidence failed to establish that the District needed to conduct an FAA or additional behavioral assessments after the April 22, 2010 incident. The evidence failed to establish that Parents requested additional assessment, or that additional assessment was warranted due to known behavior issues in Student at the relevant time. Based on Student's behaviors reported prior to, and at the time of the June 10, 2010 IEP team meeting, the FBA and mental health assessments were adequate and appropriate to investigate and address known behavior issues in Student.

24. The evidence established that at the June 10, 2010 IEP team meeting, Student's behavior had been adequately and appropriately assessed by District and a need for additional behavioral assessments was not established. A BSP dated October 26, 2009, as revised on May 21, 2010, had been developed to address, monitor and report on Student's progress towards his behavioral goals. District was able to develop appropriate baselines, goals, and behavioral supports, for Student. At the time of this IEP team meeting, District had accurate baseline statement or PLOP information about Student, and the PLOP was reflective of Student's performance level in behavior. The PLOP was sufficient to support the development of measurable behavior goals and objectives for Student. Therefore, Student failed to establish that his behavioral needs were not properly assessed by District so that it could not develop appropriate



baselines, goals, and behavioral supports. Therefore, based on the totality of the evidence, Student failed to meet his burden on Issue Six, sub-issue (b). As a result, a denial of FAPE is not found.

25. Pursuant to Factual Findings 126 and 127, and Legal Conclusions 9 through 14, as established above and discussed more fully above, Student failed to establish that his behavioral needs were not properly assessed by District so the District could not develop appropriate baselines, goals, and behavioral supports during the 2009-2010 SY and at the time of the October 18, 2010 team meeting. To the contrary, as discussed above, the evidence established that at the October 18, 2010 IEP team meeting, Student's behavior had been adequately and appropriately assessed by District. A need for additional behavioral assessments was not established. Therefore, based on the totality of the evidence, Student failed to meet his burden on Issue Seven, sub-issue (c). As a result, a denial of FAPE is not found.

Denial of instructional time in lieu of providing appropriate behavioral support or assessments

Sub-Issue 5(b): During the 2009-2010 SY, did District fail to provide Student with a FAPE because it failed to develop an appropriate IEP on May 17, 2010, because District denied Student instructional time in lieu of providing him appropriate behavioral support or assessments?

26. Pursuant to Factual Findings 88 through 90, and Legal Conclusions 6 through 14, during the 2009-2010 SY, Student failed to establish that District improperly denied him instructional time or in lieu of providing him appropriate behavioral support or assessments. The evidence showed that Student was placed in a shortened and modified school day schedule on April 26, 2010, shortly after the April 22, 2010. Parents fully participated in the decision to place student in the modified school day schedule, and consented to the April 26, 2010 IEP amendment. The offer of a modified school day

was to reduce school pressure on Student, while the IEP team determined what to do to address his behavior moving forward. The evidence established that referrals were made for additional assessments of Student, including a mental health assessment of Student. His BSP was updated, and Student received behavior supports and services based on his IEP. Because Student was on modified school day schedule following the April 22, 2010 incident, the IEP team provided Student with ESY services for Student in the May 21, 2010 IEP, to make up for any possible instructional time lost due to the shortened and modified school day schedule. Therefore, the evidence failed to support the assertion that District improperly denied him instructional time, or that instructional time was denied to Student in lieu of providing him appropriate behavioral support or assessments. Student failed to meet his burden on Issue Five, sub-issue (b). As a result, a denial of FAPE is not found.

#### Composition of IEP Team

27. The IEP team is composed of the parents of the child with a disability; at least one of the child's regular education teachers, if the student is or may be participating in the regular education environment; at least one of the child's special education teachers or, if appropriate, at least one of the child's special education providers; a representative of the school district who meets specific requirements; a person who can interpret the instructional implications of evaluation results; other persons who have knowledge or special expertise regarding the student, at the discretion of the parent or school district; and the child, if appropriate. (20 U.S.C. § 1414(d)(1)(B); Ed. Code, § 56341, subd. (b).)

Sub-Issue 6(a): Did District fail to provide Student with a FAPE because its IEP offer of June 10, 2010 was developed without Student's general education teacher present at the IEP team meeting?

28. Pursuant to Factual Findings 98 and 99, and Legal Conclusion 27, Student failed to establish that the general education teacher was a “required” member of the June 10, 2010 IEP amendment meeting, and thus Student failed to establish that he was denied a FAPE as a consequence of the general education teacher not being present when mental health goals were added to Student’s IEP at the June 10, 2010 IEP team meeting. At the time of this IEP team meeting, a decision had been made at the May 21, 2010 IEP team meeting, in which a general education teacher attended, that Student would participate in a special education SDC program, with limited general education time. No new placement decision was made at the June 10, 2010 IEP team meeting. Also, even if a determination could be made that a general education teacher was required to be present at the June 10, 2010 IEP team meeting, Student nonetheless failed to establish that a loss of educational benefit occurred as a result of the general education teacher’s absence at the June 10, 2010 IEP team meeting. Student failed to meet his burden on Issue Six, sub-issue (a). As a result, a denial of FAPE is not found on this ground.

#### Appropriateness of Goals

29. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA. The IEP must include an assortment of information, including accurate statement of the child’s present levels of academic achievement and functional performance. There is no requirement that the baseline information be measurable. The IEP must also include a statement of measurable annual goals and objectives that are based upon the child’s present levels of academic achievement and functional performance and a description of how the child’s progress toward meeting the annual goals will be measured. The IEP must include when periodic reports of the child’s progress will be issued to the parent,

and a statement of the special education and related services to be provided to the child. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.346, 300.347.)

Sub-Issue 1(a): During the 2008-2009 SY, did District fail to provide Student with a FAPE because it failed to develop an appropriate IEP on September 24, 2008, because Goal Number One was inappropriate as Student's baselines were not measureable, and because the goal was not properly implemented because necessary data was not kept by Student's teacher?

Sub-Issue 1(b): During the 2008-2009 SY, did District fail to provide Student with a FAPE because it failed to develop an appropriate IEP on September 24, 2008, because Goal Number Two was inappropriate because necessary data was not kept by Student's teacher?

Sub-Issue 1(c): During the 2008-2009 SY, did District fail to provide Student with a FAPE because it failed to develop an appropriate IEP on September 24, 2008, because Goal Number Five, subsection (a) was inappropriate as Student's baselines were not measureable, and because the goal was not properly implemented because necessary data was not kept by Student's teacher?

Sub-Issue 2(a): During the 2009-2010 SY, did District fail to provide Student with a FAPE because District failed to develop an appropriate IEP on September 16, 2009, because Goals Numbers One through Four were inappropriate as Student's baselines were not measureable, and because the goals were not properly implemented because necessary data was not kept by Student's teacher during the 2009-2010 SY?

Sub-Issue 3(a): During the 2009-2010 SY, did District fail to provide Student with a FAPE because District failed to develop an appropriate IEP on October 26, 2009, because Goal Number One was inappropriate as Student's baselines were not measureable?

Sub-Issue 3(b): During the 2009-2010 SY, did District fail to provide Student with a FAPE because District failed to develop an appropriate IEP on October 26, 2009, because Goal Number Two was inappropriate as Student's baselines were not measureable, and because the goal was not properly implemented because necessary data was not kept by Student's teacher?

Sub-Issue 3(c): During the 2009-2010 SY, did District fail to provide Student with a FAPE because District failed to develop an appropriate IEP on October 26, 2009, because Goal Number Three was inappropriate as Student's baselines cannot be measured when compared to the goal?

Sub-Issue 3(d): During the 2009-2010 SY, did District fail to provide Student with a FAPE because District failed to develop an appropriate IEP on October 26, 2009, because Goal Number Four was inappropriate as Student's baselines were not measureable, and because the goal was not properly implemented because necessary data was not kept by Student's case manager?

Sub-Issue 3(e): During the 2009-2010 SY, did District fail to provide Student with a FAPE because District failed to develop an appropriate IEP on October 26, 2009, because Goal Number Five was inappropriate because necessary data was not kept by Student's teacher?

Sub-Issue 7(a): During the 2010-2011 SY, did District fail to provide Student with a FAPE because District failed to develop an appropriate IEP on October 18, 2010, because Goals Numbers Five and Six were inappropriate because Student's baselines cannot be measured as they relate to the goals?

Sub-Issue 7(b): During the 2010-2011 SY, did District fail to provide Student with a FAPE because District failed to develop an appropriate IEP on October 18, 2010, because the two mental health goals were inappropriate because Student's baselines cannot be measured as they relate to the stated goals?

30. Pursuant to Factual Findings 6, 7, 13, and 16, and Legal Conclusion 2 and 3, any issue relating to the development of the September 24, 2008 IEP, including those issues relating to whether the baseline statement was measurable at the time the IEP was developed, are time-barred by the statute of limitation. Therefore, those matters as they relate to Issue One, sub-issues (a) through (c) are not determined herein.

31. Otherwise, pursuant to Factual Findings 5, 8 through 12, and Legal Conclusion 4 through 8, and 29, Student failed to establish that Goals Numbers One, Two and Five, subsection (a) in the September 24, 2008 IEP were inappropriate because the goals were not properly implemented because necessary data was not kept by Student's teacher during the 2008-2009 SY. The evidence showed that District properly implemented the goals and reported on Student's progress towards the goals regularly and periodically. Relevant District personnel maintained required data. Therefore, Student failed to meet his burden on Issue One, sub-issues (a) through (c). As a result, a denial of FAPE is not found.

32. Pursuant to Factual Findings 25 through 30, and Legal Conclusion 4 through 8, and 29, Student failed to establish that Goals Numbers One through Four in the September 16, 2009 IEP were inappropriate because the baselines were not measureable, or that the goals were not properly implemented because necessary data was not kept by Student's teacher during the 2009-2010 SY. The law does not require that baseline statements be measurable. Also here, as discussed above, at the time the September 16, 2009 IEP was developed, District had relevant information about Student including a statement of his present levels of academic achievement and functional performance. The IEP included a statement of measurable annual goals that were based upon Student's present levels of academic achievement and functional performance. The evidence showed that District properly implemented the goals and reported on Student's progress towards the goals regularly and periodically. Relevant District

personnel maintained required data. Therefore, Student failed to meet his burden on Issue Two, sub-issue (a). As a result, a denial of FAPE is not found.

33. Pursuant to Factual Findings 57 through 65 and Legal Conclusion 4 through 8, and 29, Student failed to establish that Goals Numbers One through Five in the October 26, 2009 IEP were inappropriate as Student's baselines were not measureable, or that the goals were not properly implemented because necessary data was not kept by Student's teacher or case manager during the 2009-2010 SY. The law does not require that baseline statements be measurable. Again here, at the time the October 26, 2009 IEP was developed, District had relevant information about Student including a statement of his present levels of academic achievement and functional performance. The IEP included a statement of measurable annual goals that were based upon Student's present levels of academic achievement and functional performance, among others. The evidence showed that District properly implemented the goals and reported on Student's progress towards the goals regularly and periodically. Relevant District personnel maintained required data. Therefore, Student failed to meet his burden on Issue Three, sub-issues (a) through (e). As a result, a denial of FAPE is not found.

34. Pursuant to Factual Findings 120 through 125, and Legal Conclusion 4 through 8, and 29, Student failed to establish that District failed to provide him with a FAPE because District failed to develop appropriate IEP in that Goals Numbers Five and Six, and the two mental health goals contained in the October 18, 2010 IEP were inappropriate as Student's baselines were not measureable. The law does not require that baseline statements be measurable. Nonetheless, at the time the October 18, 2010 IEP was developed, District had relevant information about Student including a statement of his present levels of academic achievement and functional performance. The IEP included a statement of measurable annual goals and objectives that were

based upon Student's present levels of academic achievement and functional performance, among others. The evidence showed that District properly implemented the goals and reported on Student's progress towards the goals regularly and periodically. Relevant District personnel maintained required data. Therefore, Student failed to meet his burden on Issue Seven, sub-issues (a) and (b). As a result, a denial of FAPE is not found.

#### Speech and Language Services

Sub-Issue 1(e): During the 2008-2009 SY, did District fail to provide Student with a FAPE because Student's speech and language services were reduced in the September 24, 2008 IEP when it was inappropriate for District to do so?

Sub-Issue 2(c): During the 2009-2010 SY, did District fail to provide Student with a FAPE because Student's speech and language services were reduced at the September 16, 2009 IEP team meeting when it was inappropriate for District to do so?

Sub-Issue 3(f): During the 2009-2010 SY, did District fail to provide Student with a FAPE because District eliminated his speech and language services despite Student's failure to meet his speech and language-based goals contained in his IEP of September 24, 2008, and because District eliminated speech and language services despite the fact that this IEP of October 26, 2009, contained speech and language-based goals?

35. Pursuant to Factual Findings 16, and Legal Conclusions 2 and 3, issue relating to whether Student's speech and language services were improperly reduced at the time the September 24, 2008 IEP was developed is time-barred by the statute of limitation. Therefore, this matter as it relates to Issue One, sub-issue (e) is not determined herein.



36. Pursuant to Factual Findings 17 and 18, and Legal Conclusions 4 through 8, Student failed to establish that District failed to provide him with a FAPE during the 2008-2009 SY because his speech and language services were inadequate or reduced when it was inappropriate for District to do so. The evidence failed to establish that Student's speech and language services were either reduced, or improperly reduced during the 2008-2009 SY or from February 1, 2009, onward. This allegation made by Student was not substantiated by any evidence presented at the hearing. Thus, Student failed to meet his burden on Issue One, sub-issue (e). As a result, a denial of FAPE is not found.

37. Pursuant to Factual Finding 36, and Legal Conclusions 4 through 8, Student failed to establish that District failed to provide him with a FAPE during the 2009-2010 SY because his speech and language services were reduced when it was inappropriate for District to do so. Based on the evidence, Student's speech and language services were neither reduced nor improperly reduced at the September 16, 2009 IEP team meeting. Student failed to meet his burden on Issue Two, sub-issue (c). As a result, a denial of FAPE is not found.

38. Pursuant to Factual Findings 66 and 68, and Legal Conclusions 4 through 8, Student failed to establish that District eliminated his speech and language services despite his failure to meet his speech and language-based goals contained in his September 24, 2008 IEP, or because District eliminated speech and language services despite the fact that this IEP contains speech and language-based goals. Here, the evidence failed to show that Student did not meet his speech and language-based goals contained in his IEP of September 24, 2008. To the contrary, based on District's reporting and undisputed evidence at the hearing, Student had met his speech and language goals that were contained in his September 24, 2008 IEP at the time of the October 26, 2009 IEP team meeting. Even if it could be argued that the October 26, 2009

IEP contained speech and language-based goals, Student failed to show that District eliminated the speech and language services from Student's October 26, 2009 IEP improperly, or that Student was denied a FAPE as a result. Mr. Pridgeon's speech and language assessment dated October 26, 2009, had found that Student was not eligible for speech and language services, and thus the services were eliminated. As required by law, the assessment result was presented at the October 26, 2009 IEP team meeting. At the hearing, no persuasive evidence was presented by Student to show that Mr. Pridgeon's assessment of Student was invalid, or that his conclusions regarding Student's eligibility for speech and language services were wrong. Therefore, Student failed to meet his burden on Issue Three, sub-issue (f). As a result, a denial of FAPE is not found.

#### OT Services

Sub-Issue 5(c): During the 2010-2011 SY, did District fail to provide Student with a FAPE because District failed to offer him OT services at the May 17, 2010 IEP team Meeting?

39. Pursuant to Factual Findings 91, 92 and 94, and Legal Conclusions 4 through 8, Student failed to establish that District failed to provide him with a FAPE because District did not offer him OT services at the IEP of May 17, 2010, but rather at the May 21, 2010 IEP. Student did not challenge the appropriateness of the May 21, 2010 OT services, or establish how a four-day delay in making an offer of services denied him an educational benefit or prevented Parents from meaningfully participating in the educational decision-making process. The evidence failed to show that Student was denied educational benefits or FAPE as a result of an insignificant four-day delay by District in providing him the OT services. Student failed to meet his burden on Issue Five, sub-issue (c). As a result, a denial of FAPE is not found.

## LRE Requirements

40. Federal and State law requires school districts to offer a program in the least restrictive environment for each special education student. (See 34 C.F.R. §§ 300.114, et. seq.) A special education student must be educated with non-disabled peers “[t]o the maximum extent appropriate,” and may be removed from the regular education environment only when the nature or severity of the student’s disabilities is such that education in regular classes with the use of supplementary aids and services “cannot be achieved satisfactorily.” (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i) & (ii).) A placement must foster maximum interaction between disabled students and their non-disabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code, § 56031.) The law demonstrates “a strong preference for ‘mainstreaming’ which rises to the level of a rebuttable presumption.” (Daniel R.R. v. State Bd. of Ed. (9th Cir. 1989) 874 F.2d 1036, 1044-1045; see also § 1412 (a)(5)(A); Rowley, supra, 458 U.S. at p. 181 n.4; Poolaw v. Bishop (9th Cir. 1995) 67 F.3d 830, 834.)

41. In *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400-1402, the Ninth Circuit held that the determination of whether a particular placement is the “least restrictive environment” for a particular child involves an analysis of four factors, including (1) the educational benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district’s proposed setting. However, the Supreme Court has noted that the IDEA’s use of the word “appropriate” reflects Congressional recognition “that some settings simply are not suitable environments for the participation of some handicapped children.” (Rowley, supra, 458 U.S. at p. 197.)

Sub-Issue 6(c): During the 2010-2011 SY, did District fail to provide Student with a FAPE because District failed to offer Student a placement in the LRE at the June 10, 2010 IEP team meeting?

Sub-Issue 7(d): During the 2010-2011 SY, did District fail to provide Student with a FAPE because District failed to offer Student a placement in the LRE at the October 18, 2010 IEP team meeting?

42. Pursuant to Factual Findings 104 through 116, and 128 through 130, and Legal Conclusions 39 and 40 through 41, Student failed to establish that District failed to offer him a placement in the LRE, or that District failed to provide him with a FAPE for this reason. The evidence established that the time the June 10, 2010 and the October 18, 2010 IEP offers were made, the SDC class at Bauer Speck was the LRE for Student due to his disability and unique academic and behavioral need, and based on the information District had about Student, disability and unique needs, when those offers were made.

43. The SDC class at Bauer Speck for the 2010-2011 SY was placement the in the LRE for Student. Student would receive greater educational benefits and receive additional academic and behavioral supports in the SDC classroom, due to higher adult-to-student ratio, more structure and simplified educational curriculum, among others. His behavior challenges, which were impacting his learning, would be better monitored and addressed, leading to better outcomes in both the academic, behavioral and social-emotional areas of Student's needs. As demonstrated at the hearing, Student was making meaningful progress in the SDC placement, unlike in the general educational setting where Student's behaviors interfered with his learning and his academic progress was made primarily on the special education resource room program. Both Dr. Ball and Dr. Ferguson's opinions that Student could make meaningful educational progress in the general educational setting with additional behavioral support and services were not

supported by any relevant observation or assessment information developed of Student while he was in the general education setting or placement. Neither of the doctors observed or evaluated Student's behavior in the general education setting, or observed Student's general education setting during the relevant time. The District's offer provided Student non-academic benefits as he would be able to receive both academic and non-academic benefits from the placement. Student was a disruptive influence in regular education placement at Kermit King, contrary to what was reported of his SDC placement. Program cost is not an issue in this case. A balancing of the factors establish that the District's June 10, 2010 and October 18, 2010 placement offer was the LRE for Student because of his need to obtain full and meaningful academic benefits.

44. In formulating the offers, District considered available information presented by Parents, Parents' and Student's advocate, teachers, and District's staff, and from early intervention services and mental health agency. Parents' preferred placement in a general education placement at Kermit King ceased to be the LRE for Student after his mental health crisis on April 22, 2010, because he could not obtain meaningful academic and non-academic benefit due to his escalating behaviors, which apparently were partly coming from the academic pressures of that setting. At that point, Student was not making friends and was regressing socially. He preferred obtaining academic instruction from a self contained resource room, which was similar to the SDC placement in structure, and often stayed away from his peers. The stress of the academic demands in the general education setting and the manner of the classroom instruction caused Student to act out and disrupt the class. His behavior was uncontrolled or inconsistently controlled. In contrast, the SDC class was smaller in size and had more structure, with less transition. Student would receive additional academic and behavioral assistance in the SDC placement, and simplified curriculum and accommodations, among others. District demonstrated that Student's varying and

unique educational needs could be met in the SDC placement.<sup>24</sup> Therefore, Student failed to meet his burden on Issue Six, sub-issue (c), and Issue Seven, sub-issue (d). As a result, a denial of FAPE is not found on these grounds.

45. Overall, pursuant to Factual Findings 1 through 130, and Legal Conclusion 1 through 49, Student did not prevail on any issue. District's IEP offers must address Student's known disability and unique educational needs at the time the IEP offer was made, and each IEP must be designed to provide Student with educational benefits. Pursuant to Factual Findings 2 through 130, and Legal Conclusions 2 through 49, the District's IEP offer dated September 16, 2009, October 26, 2009, March 11, 2010, May 17, 2010, June 10, 2010, and October 18, 2010, among others discussed in this decision, provided Student with a FAPE because they were reasonably calculated to provide Student with meaningful educational benefit in the LRE, at each relevant time.

46. Student's case appears to focus mostly on outcomes, rather than the processes that led to the development of each IEP offer to him and the evaluation of each substantive IEP offer based on the information District had about his disability and unique educational needs at the point the IEP offer was made. IEPs are not evaluated in hindsight. Therefore, the question must be whether the IEP offers at issue in this matter were designed to confer meaningful educational benefits on Student at the time each offer was made, and based on the information District had about his disability or suspected disability and his unique educational needs. Applying this standard, it is clear, based on the evidence, that Student IEPs, at the time each was developed, were designed to meet Student's known and unique needs and were designed to provide

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<sup>24</sup> The evidence has since established that Student received meaningful educational benefit in this placement.

Student with meaningful educational benefits. Student made progress and received meaningful academic benefits.

47. While the results of District's behavior interventions varied and were inconsistent, as Student had periods when his behavior improved and those times when his behavior escalated or worsened, those varied results are not established to be due to improper designs of his IEP or the behavior interventions in his IEP. At the hearing, Dr. Ball credibly testified that the functions of Student's behaviors were not obvious at times, as Student often employed certain behaviors for no apparent, observable and assessable reasons. Based on the evidence, the erratic nature of Student's behavior and its erratic response to interventions have presented some challenges in developing behavior interventions for Student.

48. Since the last IEP at issue in this case, parties have agreed, and Student has been independently assessed in additional and newly suspected areas of disability. Those IEEs included a "Pediatric Neurology Assessment" dated November 15, 2010, by Dr. Debra Balke, a "Confidential Diagnostic Assessment" dated January 10, 2011, by Dr. Ferguson, OT Assessment dated January 3, 2011, by Paul Filkins, and a FAA dated February 28, 2011, by Dr. Ball. While these independent assessments are not relevant to the issues presented in this matter, and as thus could not be used to evaluate the IEP offers that were made prior to their existence, they appear to provide additional insights into Student's behavioral disability and needs. For example, in her report dated January 10, 2011, Dr. Ferguson concluded that Student is autistic. This recent diagnosis of autism appears to be the basis of Student's claim that his behaviors have not properly assessed prior and over the years. However, it was not established in this hearing that District knew, or should have suspected that Student may be, or that he is autistic. The last IEP offer that is in issue in this case was made at the October 18, 2010 IEP team meeting. Prior to Dr. Ferguson's assessment, the evidence failed to establish that autism or

“autistic-like-behavior” or characteristics, including pragmatic language issues, was a documented or suspected area of disability in Student. Prior assessments, including Student’s Preschool Early Intervention Assessment dated November 17, 2006 have not suspected autism. If the diagnostic is found credible, Student’s inconsistent responses to District’s prior behavior interventions and his continued struggles with language and speech could be explained, and could thus be addressed through new interventions that are proven to work with autistic children. Perhaps therefore, Student’s IEP team may need to reconvene in order to evaluate the additional assessments’ information that has been developed regarding Student’s possible additional disability and needs. Otherwise, no finding is made regarding these IEEs that were conducted after the October 18, 2010 IEP.

49. Overall, based on the preponderance of the evidence, the District’s IEPs that were presented for review in this matter were found to be reasonably calculated to provide Student with a meaningful educational program and benefits in the LRE.

#### ORDER

All of Student’s requests are denied.

#### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on all issues heard and decided.

#### RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)



Dated: July 27, 2011

A handwritten signature in black ink, appearing to read 'Adeniyi Ayoade', written over a horizontal line.

ADENIYI AYOADE

Administrative Law Judge

Office of Administrative Hearings